THE
MODERN LAW REVIEW

Volume 15 April 1952 No. 2

INCONSISTENCIES AND INJUSTICES IN THE LAW OF HUSBAND AND WIFE

"THE state of the law today as to the relations of husband and wife seems to me to be fraught with inconsistency and injustice." [1] The words were spoken in 1930. Four years later, in January, 1934, the Lord Chancellor, Lord Sankey, appointed the Law Revision Committee, and one of its terms of reference was "the liability of the husband for the torts of the wife . . . and the liability of a married woman in tort and in contract. . . ." Of the many "injustices" and "inconsistencies" of this branch of the law only two were thus subjected to the scrutiny of the Committee. Its task was to examine the effect of two decisions: *Edwards* v. *Porter* [2] and *Scott* v. *Morley*.[3] The major problems of the general effect of marriage on the property of the spouses and on their mutual relations in matters such as property, contract and tort were not included in the terms of reference, nor was the equally important question of the position of outsiders, and in particular of creditors, with regard to property transactions between husband and wife. Nevertheless the recommendations of the Committee [4] and the Law Reform (Married Women and Tortfeasors) Act, 1935, Part I, which carried them into effect, constituted a frontal attack on some of the fundamental problems of the law of husband and wife. The Act abandoned the traditional method [5] of dealing with the question of married women's property by extending the equitable conception of the "separate estate." For the first time it gave effect to the three basic principles of equality of status and capacity, of separation of property, and of separation of liabilities. Its "dominant intention" was indeed "clear beyond all doubt." It was "to effect

1 *Per* McCardie J. in *Gottliffe* v. *Edelston* [1930] 2 K.B. 378, at p. 381.
2 [1925] A.C. 1.
3 (1887) 20 Q.B.D. 120.
4 Law Revision Committee Fourth Interim Report, Cmd. 4770/1934, No. 23, p. 12.
5 This method was employed in the Married Women's Property Acts of 1870 and of 1882, but the modern method was used in s. 21 of the Matrimonial Causes Act, 1857, which is still in force, and in s. 26, which became s. 194 of the Judicature Act, 1925, and the last vestiges of which can now be found in s. 21 of the Matrimonial Causes Act, 1950.

a drastic reform of our law in a branch where there has been too much legal fiction and too much technicality of legal procedure." [6] Whether it succeeded in making " a clean sweep of the old fiction of our common law that a woman on marrying became merged in the personality of her husband and ceased to be a fully qualified and separate human person," [7] is a different question. The Act made no attempt to reform the law on mutual dealings and liabilities between husband and wife. On the contrary, it expressly reaffirmed one of the basic statutory provisions in this matter which was itself an outcome of the doctrine of " unity of husband and wife," [8] and in the law of evidence, in criminal law, in the conflict of laws, and in some branches of the law of tort that doctrine continues to have its important consequences to this day.[9] In spite of appearances, therefore, the Act of 1935 is not a codification of the law of husband and wife, it is not even a codification of the " property aspect " of this branch of the law. It is no more than an unusually radical amendment of certain rules of the common law. It has left in being many of the anomalies of which McCardie J. complained more than twenty years ago, and it is the object of this paper to deal with three of them: those concerning the mutual liabilities of husband and wife, especially in tort, those affecting the position of the wife with regard to savings, and those encroaching upon the rights of creditors in connection with gifts and other transfers of property between the spouses.

Before these matters can be discussed, it is however necessary to say a word about a point of principle which must be indicated but which cannot be fully analysed in this article. The two rules of equality of status and capacity and of separation of property between the spouses are linked in the Act of 1935, as, in a way, they were linked in its predecessor, the Married Women's Property Act, 1882. This is no more than an historical accident. The two rules are quite distinct. A system of equality between the legal status of married women and that of unmarried women and of men is compatible with a matrimonial régime of joint property of the spouses, as in France,[10] or of the husband's right to enjoy the income of, and his power and duty to administer, the wife's property, as in Germany.[11] In this country the common law

[6] *Per* Scott L.J. in *Barber* v. *Pigden* [1937] 1 K.B. 664; [1937] 1 All E.R. 115, 125.

[7] *Per* Scott L.J., *ibid.*, and, similarly, in *Rees* v. *Hughes* [1946] K.B. 517; [1946] 2 All E.R. 47, 50.

[8] Married Women's Property Act, 1882, s. 12; see s. 1 and both Schedules of the 1935 Act.

[9] See Glanville Williams, " The Legal Unity of Husband and Wife " (1947) 10 M.L.R. 16.

[10] *Code Civil*, art. 1401, but it does not extend to land belonging to either spouse at the time of the marriage or subsequently acquired by gift or inheritance, art. 1404, 1405.

[11] *Buergerliches Gesetzbuch*, para. 1363; for the most important exceptions see paras. 1366, 1367.

refused to give the wife any capacity to make contracts in her own name while the marriage lasted. This rule was perhaps less the outcome of a general theory of the *fragilitas muliebris sexus* [12] (which may probably be said to have had a greater effect on equity than on the common law) [13] than of the need for preventing persons incapable of disposing of, and to some extent even of owning, property, from incurring liabilities which, in the absence of assets, would have been unenforceable in practice. In other words: the effect of marriage on the property of the spouses was, at common law no less than in those nineteenth and twentieth century statutes which amended it, linked with the status of a married woman, but one may venture to assume that the rules as to status resulted from those as to property and not vice versa. The "liberation" of the married women of the propertied classes which equity brought about was, as Dicey clearly demonstrated, only an incidental result of the Chancellor's desire to preserve her property for the wife and her clan or next-of-kin, and not informed by any principle of the equality of the sexes.[14] When, under the influence of social transformations and of a rapidly changing public opinion,[15] the inequality of status between married women and other citizens became intolerable, it was in people's minds connected with the domination the husband exercised at common law over his wife's property. In the process of giving to women the legal status which reflected their position in society, English law adopted, almost by accident, a régime of "separation of goods." This régime has its advantages, but it also has its very great disadvantages, and to emphasise the latter does not mean in any shape or form to question the need for, and the justice and wisdom of, the rule of equality of status and capacity.

As the law stands today, husband and wife face each other in matters of property like strangers. The fact that they are husband and wife has no effect on their property. Nothing is by law "theirs," everything, from the kitchen cupboard to the savings bank account, and from the family car to the matrimonial home itself, is, in the absence of an express agreement to the contrary,[16] either "his" or "hers." Sociologists must decide whether this legal rule reflects the *mores* and ideas of the people. It is strongly suspected that it does not. Where husband and wife live together in amity (a situation which is perhaps more often brought to the notice of social scientists than to that of lawyers in the course of

12 The words are Justinian's: I. 2, 8, pr. How much Roman Law did Shakespeare know? (Hamlet I, 2). Or is this a "Baconian" point?

13 Although Parker J., in *Johnson* v. *Clark* [1908] 1 Ch. 303, 317, called the restraint on anticipation "a tribute on the part of Courts of Equity to the wisdom of the common lawyers."

14 Dicey, *Law and Public Opinion in England*, Lecture XI.

15 J. St. Mill's *Subjection of Women* was published in 1869, the first Married Women's Property Act was passed in 1870.

16 See s. 4 (2) (*c*) of the 1935 Act.

their professional activities) what predominates is the unity of the household, the existence of what Lord Halsbury called the " common family fund " [17] and Goddard L.J. (as he then was) the " common establishment." [18] Social insurance and family allowances legislation [19] as well as income tax law [20] have translated this social phenomenon into legal norms, but the Act of 1935 ignores it. Earlier legislation, like the common law, had, consciously or unconsciously, given effect to the unity of the household, although it did so in part in a way which is unacceptable in our time. But nature, driven out with a pitchfork, comes back. Despite the separation of property of husband and wife, the merger of many of their worldly possessions is and remains a fact. Grave injustices and no less grave inconsistencies result today from this clash between what happens in fact and what the law supposes to happen. Others are inherent in the survival of legal rules based on an antiquated conception of the unity of the household. The victims are not always the spouses themselves, but equally often those who enter into transactions with either of them or who suffer from their wrongful conduct.

I

Mutual Liabilities of Husband and Wife

Contractual and quasi-contractual liability

As already mentioned, the Act of 1935 did not expressly deal with the mutual liability of husband and wife. In this respect the rules of the common law and those of previous legislation, especially the Married Women's Property Act, 1882, continue to be of practical importance. This, however, has less significance with regard to contractual and quasi-contractual liabilities between the spouses than in connection with the law of tort.

It may nevertheless be useful to remind ourselves that the common law doctrine of the legal unity of husband and wife had, in relation to contracts between them, three different aspects:

(1) A man was unable to contract with his wife during marriage, for " to covenant with her would be to covenant with himself." [21] Thus, a contract between husband and wife was void for two reasons: on the ground that a married woman had no contractual capacity at all, and on the ground that a man cannot contract with himself.

[17] *Main Colliery Co., Ltd.* v. *Davies* [1900] A.C. 358, 361.
[18] *Youngs* v. *Youngs* [1940] 1 K.B. 760; [1940] 1 All E.R. 349, 354.
[19] Family Allowances Act, 1945, s. 1, s. 4; the acquisition by the wife of a right to certain maternity benefits, to widow's benefit and retirement pension through the husband's contributions (National Insurance Act, 1946, s. 14 (1), s. 17 (1), s. 21) is but one of many manifestations of the " family fund " principle in this branch of the law.
[20] Income Tax Act, 1918, All Schedules Rule 16, proviso (1).
[21] Blackstone, *Commentaries*, Book I, Chap. 15; 1st ed. (1765), p. 442; 18th ed. (1821), p. 504.

(2) Contracts "made between husband and wife, when single, are voided by the inter-marriage." [22]

(3) During marriage a husband could not sue his wife nor a wife her husband. This rule belonged to the law of procedure, not to the substantive law. It followed not only from the general doctrine of unity, but also from the more special doctrine that a married woman could, exceptions apart, neither sue nor be sued without the husband being made joint plaintiff or joint defendant.[23]

The Married Women's Property Act, 1882, abolished the first of these rules. It did so by the—now repealed [24]—section 1 (2), by which "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract. . . ." It was not open to serious doubt that "any contract" included a contract with her husband,[25] and contracts between husband and wife began, soon after the coming into force of the Act, to be enforced by the courts, even outside the limited field in which equity would have enforced them.[26]

The procedural principle against actions between husband and wife, the third of the rules mentioned above, was also swept away by section 1 (2) of the 1882 Act by which a married woman was made "capable . . . of suing and being sued, either in contract or in tort, or otherwise. . . ." This clearly covered proceedings against or by her husband who did no longer have to be joined as plaintiff or defendant in actions brought by or against her. On this there cannot be, nor does there ever seem to have been, any doubt.[27]

The result was that, as regards contracts made during marriage, the common law doctrine of unity and its sub-rules ceased to apply altogether. This remains true under the Law Reform (Married Women and Tortfeasors) Act, 1935. The place of section 1 (2) of the 1882 Act has been taken by section 1 (*b*) and (*c*) of the 1935 Act according to which "a married woman shall be capable of rendering herself, and being rendered, liable in respect of any . . . contract, debt or obligation" and also of suing and being sued

22 Blackstone, *ibid.*

23 Lush, *Husband and Wife*, 4th ed. (1933), pp. 573 *et seq.*

24 Law Reform (Married Women and Tortfeasors) Act, 1935, s. 5; Second Schedule.

25 *Lush*, pp. 261 *et seq.*

26 *Butler* v. *Butler* (1885) 16 Q.B.D. 374. The three judgments in the Court of Appeal did not rest on the construction of s. 1 (2), but on the rule of equity that a married woman could contract with her husband with regard to her separate estate and on the extension of that rule to all property which, under the Act of 1882, had become the wife's separate estate by statute. See especially *per* Lord Esher M.R. at p. 376, and *per* Cotton L.J. at p. 378. It is interesting that, on the obvious rule that in equity the spouses could enter into valid contracts concerning the wife's separate estate, no case was, according to Lord Esher, "precisely in point." In this branch of the law much is taken for granted, and it is not always easy to give chapter and verse for legal rules the existence of which is not doubted by anyone.

27 *Lush*, pp. 579 *et seq.* The learned author was of the opinion that this result was reinforced by s. 12 of the Act.

" in all respects as if she were a feme sole." This point raises no problem.

While thus the artificial rule of unity has disappeared as far as post-nuptial contracts between the spouses are concerned, the unity of the household as a fact has remained. In the law of contract the Court of Appeal recognised the existence of this natural or social unity in the celebrated case of *Balfour* v. *Balfour*.[28] Transactions which, as between strangers or as between spouses living apart, would be contracts, do not necessarily have that character if entered into between husband and wife where the marriage is a " going concern." This is so, not because any legal doctrine would prevent the agreement from being a contract but because the parties cannot be assumed to have intended to create legal relations. " Agreements such as these are outside the realm of contracts altogether. . . . In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted." [29] *Balfour* v. *Balfour* is one of those wise decisions in which the courts allow the realities of life to determine the legal norm which they formulate. Its ruling has in no way been affected by the Act of 1935.

It is when we come to pre-nuptial contracts, to the second of the three common law rules enumerated above, that we enter the realm of speculation. Did husband and wife, under the 1882 Act, continue to be liable towards each other on contracts entered into before marriage or in respect of quasi-contractual liabilities incurred while they were single? As regards the husband's liability to the wife, it is said [30] that it continued during marriage as a result of section 12 of the 1882 Act, according to which a married woman has against all persons, including her husband, the same civil remedies for the protection and security of her property as if she were a feme sole. This presupposes that every contractual claim is a means of protecting or securing property, and, although this is not free from doubt in all cases, it will be true of the vast majority of all contracts. Section 12 is still in force, and since, as will be submitted presently, a married woman is now liable to her husband on pre-nuptial contracts and quasi-contracts, the view that the husband is liable by virtue of section 12 should be accepted in the interest of " mutuality," although the interpretation of the section on which it rests may, in some exceptional instances, be assailable on theoretical grounds.[31]

[28] [1919] 2 K.B. 571.

[29] *Per* Atkin L.J. at p. 579.

[30] *Chitty on Contracts*, 20th ed., Chap. XIV, p. 661.

[31] It would be difficult to assert that, *e.g.*, a contract by which the future husband, a famous painter, undertakes to give lessons to his future wife, is a contract concerning her property. The problem whether nevertheless an action on the contract would be a remedy for the protection and security of her property because the contractual right is a chose in action will be discussed below in connection with torts.

The Act of 1882 did not, however, abolish the rule of the common law that a married woman was not liable to her husband on pre-nuptial contracts and quasi-contracts. Thus, a husband was unable to recover a loan granted before marriage to his future wife or money then paid on her behalf at her request.[32] There does not appear to have been any decision on this point since the passing of the 1935 Act. It is submitted that the Act has changed the law laid down in *Butler* v. *Butler*, but in order to prove this point it is necessary to analyse in some detail the reasoning of the judgment of Wills J.

The learned judge rejected an argument advanced by counsel for the husband that the 1882 Act had destroyed the doctrine of unity of husband and wife.[33] This part of the judgment was not only indubitably correct under the 1882 Act,[34] but would be equally correct today under the 1935 Act.[35] He further adverted to the provisions of the Act of 1882 in detail. In particular he considered whether section 13 of the Act had made a married woman liable for contractual and quasi-contractual debts incurred before marriage towards her future husband. Section 13 said (and says) that, after her marriage, a woman continues to be liable "for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage." Did this include debts contracted to, and contracts entered into with, her future husband? The judge answered the question in the negative. For this he gave three reasons, only one of which can apply now in view of the amendment of the 1882 statute by the 1935 Act. In the first place, he said, if section 13 covers liability towards the future husband, it must do so not only in the law of contract but also in the law of tort ("wrongs committed"). Yet this delictual liability is expressly negatived by the immediately preceding section 12. Had section 13 contemplated liability between the spouses, it would have contained some reference to the preceding section. This part of the argument continues to apply under the present law, unless there is some other provision in the 1935 Act which outweighs it. In the second place, Wills J. referred to an additional provision in section 13 which is now repealed.[36] According to this, the wife's separate property was, as between her and her husband, primarily liable for her pre-nuptial indebtedness. This, of course, would not have made any sense in connection with liabilities between the spouses. Thirdly, Wills J. observed that section 13 had to be read in conjunction with the (now repealed) sections 14 and 15[37] which were only applicable to liability to strangers. This third point,

32 *Butler* v. *Butler* (1885) 14 Q.B.D. 831. There was no appeal against this part of the judgment of Wills J.
33 At p. 836.
34 *Edwards* v. *Porter* [1925] A.C. 1.
35 *Baylis* v. *Blackwell* [1952] 1 All E.R. 74.
36 1935 Act, Second Schedule.
37 *Ibid.*

too, has now lost its validity. Of the "liberating" section 1 (2) of the 1882 Act he merely said that it was purely procedural, which was incorrect because this enactment not only gave the married woman the capacity to sue and to be sued by herself, but also the capacity to contract.

Nevertheless, even if the judge had examined the substantive element in section 1 (2) of the 1882 Act, he might not, as the law then stood, have arrived at any other decision. That provision merely enabled the married woman to enter into and to render herself liable on any contract, and, even without the addition "in respect of and to the extent of her separate property" this would have referred only to such contracts as were made during marriage. It is here that the 1935 Act has made a change. Section 1 (*b*) makes a married woman capable not only of rendering herself liable in contract, but also of "being rendered liable," as if she were a feme sole. These additional words would seem to cover the case of the woman being rendered liable on debts incurred prior to marriage. Her liability to strangers is covered by the unrepealed part of section 13 of the 1882 Act, but section 1 (*b*) of the 1935 Act appears to be applicable to the wife's pre-nuptial debts towards her husband. Since this enactment is expressly "subject to . . . the provisions of section 12" of the 1882 Act, it does not contradict the principle that a man cannot sue his wife for pre-nuptial torts.[38] In other words: the new Act equates the married woman's liability to that of an unmarried woman not only by laying down her capacity, during marriage, to enter into contracts, but also by regulating her contractual liability during marriage without any reference to the time when it was incurred. The rule in *Butler* v. *Butler* is thus removed, and a married woman rendered liable for debts incurred to her husband before marriage, and this is, as need hardly be emphasised, in the spirit of the Act of 1935 and of modern legislation as a whole.

Perhaps this laboured analysis of the comparatively simple problems of contractual liability will have convinced the reader of this article that the legislator of 1935 might have been well advised to strike at the root of the matter, *i.e.*, at the common law rule of unity, instead of lopping off one or two of the branches of the tree. This impression will be strengthened by the following discussion of the law of tort.

Liability in Tort: The Rule

It is apposite, as in the case of contracts, to distinguish between the substantive and the procedural aspects of the doctrine of unity at common law. Two rules, it is submitted, should be clearly kept apart:

[38] The learned editor of the chapter on "Contracts with Married Women" in *Chitty on Contracts*, 20th ed., p. 662, arrives at the same result, but along a different line of reasoning.

(1) No act committed by one spouse against the other during marriage could be a tort.[39]

(2) Neither spouse could sue the other during marriage or continue, during marriage, proceedings started before.[40]

The first of these rules precluded any claim in respect of a wrongful act alleged to have been committed during marriage by the husband against the wife or by the wife against the husband, no matter when the claim was raised. It made it impossible for the husband to claim, against his deceased wife's estate, damages for a tort alleged to have been committed by her, even in so far as the case would have come within those exceptions which the common law had grafted upon the rule *actio personalis moritur cum persona*. The same would have been true of a similar claim made by the widow against the husband's estate, or by the personal representative of either spouse against the surviving spouse. The present writer has been unable to find an actual decision to this effect, but the matter is put beyond all doubt by *Phillips* v. *Barnett*[41] where a woman's attempt to sue her husband after divorce for an assault alleged to have been committed during the marriage was defeated by the rule of the common law against tortious liability between husband and wife. It was the substantive rule alone and not the procedural rule which determined the matter, because the action was not one between husband and wife.

The second, *i.e.*, the procedural, rule made it impossible for either spouse to sue the other in tort as long as they were married, irrespective of whether the tort was alleged to have been committed before or during marriage. It is impossible to say whether marriage destroyed, as a matter of substantive law, the right to recover damages for a pre-nuptial tort which at the time of the marriage was vested in either spouse against the other. The question did not arise because the procedural principle sufficed to determine the issue. Had there at common law been a rule about contribution between tortfeasors similar to the one now enacted in Part II of the Law Reform (Married Women and Tortfeasors) Act, 1935, the question might conceivably have arisen. It might have been necessary for a court to decide whether, *e.g.*, a third party sued for a tort alleged to have been committed against the wife before her marriage could have claimed contribution from the husband as a joint tortfeasor. This would not have been an action between husband and wife for the pre-nuptial tort, and it would have been for the court to say whether the husband's substantive liability to his wife on which the third party would have relied had been extinguished by the marriage. But all this is purely hypothetical, and it would be unprofitable even to mention this problem, were

[39] *Phillips* v. *Barnett* (1876) 1 Q.B.D. 436.
[40] Note 23, *supra*.
[41] *Ubi supra*.

it not for the fact that the common law rules have, to a considerable extent, survived the legislation of 1882 and of 1935.

The Married Women's Property Act, 1882, gave no general ruling on a married woman's substantive rights or liabilities in tort,[42] comparable to the principle on contractual liability enacted in section 1 (2). There was no reason why it should have done so. The Act was not a codification, but a measure to amend the common law, and where the common law did not seem to be in need of amendment, the statute was silent. At common law a married woman was capable of rendering herself liable in tort (although the husband was also liable), and no enactment was required in order to confer delictual capacity upon her. She was also capable of acquiring delictual rights, as she was capable of acquiring other choses in action,[43] but the power of reducing the chose of action to possession vested in the husband. That power was removed by sections 2 and 5 of the Act. Hence, as regarded a married woman's delictual rights against, and liabilities towards, strangers, all that remained of the common law after the 1882 Act was the rule that the husband was liable for his wife's torts, a rule abolished by section 3 of the Act of 1935.

The common law rule against tortious liabilities between husband and wife, however, did not rest on any delictual incapacity of the wife or (in so far as the husband's torts were concerned) on her inability to dispose of choses in action. It was a direct outcome of the rule of unity. This independent rule that there could be no tort between the spouses was left intact by the Act of 1882,[44] subject to an exception with reference to torts committed by the husband against the wife's property. This will be discussed below.[45]

So much, then, as regards the fate of the substantive common law rule under the 1882 Act. The procedural rule against actions between husband and wife in tort would have been removed by section 1 (2) of the 1882 Act, had it not been expressly re-enacted by section 12. The provision that a married woman was to be "capable . . . of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole," was, as pointed out above, sufficiently wide to cover actions in contract between husband and wife.[46] By parity of reasoning it was also wide enough to include actions between spouses in tort. Had it not been for section 12, husband and wife would still, as a result

[42] *Ex abundante cautela*, it seems, s. 13 lays down that a married woman remains liable for pre-nuptial torts.

[43] A delictual right is a chose in action within the meaning of s. 24 of the 1882 Act and therefore "property." It is submitted that, in so far, the decision of the Court of Appeal in *Curtis* v. *Wilcox* [1948] 2 K.B. 474 is correct, and that, on this point, the decision of McCardie J. in *Gottliffe* v. *Edelston* [1930] 2 K.B. 378 was wrong. See *infra*, p. 151.

[44] *Phillips* v. *Barnett*, *supra*, is still considered as law: see *per* Slesser L.J. in *Fender* v. *Mildmay* [1936] 1 K.B. 111, 125 *et seq.*; Salmond, *Torts*, 10th ed., p. 67; *Lush*, p. 588.

[45] s. 12 of the 1882 Act.

[46] *Supra*, note 27.

of the substantive rule against tortious liability arising during marriage, have been prevented from suing each other for post-nuptial torts, but they might have sued one another for torts alleged to have been committed before marriage. The relevant words in section 12 are: "no husband or wife shall be entitled to sue the other for a tort." It can hardly be doubted that Lush [47] is right in saying that this part of section 12 is an exception to the procedural provision in section 1. Thus the procedural rule against actions between the spouses in tort would have passed into legal history had it not been expressly formulated in section 12. At the same time, however, the words "no husband or wife shall be entitled to sue the other for a tort" have also to be construed as a statutory reaffirmation of the common law rule against substantive liability. This was, *e.g.*, the attitude of Hallett J. in *Chant* v. *Read*.[48] Moveover, this view receives support from the construction of the exception to the rule, which refers to the woman's remedies for the protection and security of her property and which will be discussed below. On this view, section 12 embodies two rules: a substantive rule reiterating a principle of the common law, and a procedural rule creating an exception to the abolition, by section 1 of the Act, of another principle of the common law.

It is unnecessary to mention all the decided cases in which either a husband or a wife suffered defeat, as a result of the section, when attempting to make the other spouse liable in tort: be it sufficient to mention, on the one hand, *Webster* v. *Webster*,[49] where the husband tried in vain to obtain against his wife an injunction to restrain her from pledging his credit (conduct which, in the circumstances, would have been tortious), and *Ralston* v. *Ralston*,[50] on the other hand, as an example of a case in which the principle of the section was invoked by the husband against the wife, with the result that her action for libel against him was dismissed.

The Law Reform (Married Women and Tortfeasors) Act, 1935, made no change in this aspect of the law of husband and wife. The Law Revision Committee was hamstrung by the narrowness of its terms of reference, or, in any event, by the interpretation it gave to these terms. It did not consider that "the liability of a married woman in tort and in contract" covered her liability towards her husband. Hence it made no recommendation on this point. It proposed [51] a verbal and consequential amendment of section 12 of the 1882 Act (which was carried into effect by the Act of 1935 [52]), and further suggested, *sotto voce*, as it were, that

[47] p. 581, and see *per* Rowlatt J. in *Webster* v. *Webster* [1916] 1 K.B. 714.
[48] [1939] 2 K.B. 346; [1939] 2 All E.R. 286.
[49] *Supra*, note 46. The case is of very great interest from the point of view of the question whether there is a general "innominate" tort.
[50] [1930] 2 K.B. 238.
[51] Cmd. 4770/1934, p. 12.
[52] First and Second Schedules.

" when amending the section it may be thought desirable to give to a husband similar rights in respect of his property to those given by the section (as amended) to a wife in respect of her property. There may also be those who think it desirable further to amend section 12 by omitting the words ' except as aforesaid no husband or wife shall be entitled to sue the other for a tort.' " However, these matters were regarded as outside the terms of reference.

The draftsman or the legislature did not take the hint of this *obiter dictum*. On the contrary : section 1 of the 1935 Act which deals with the status and capacity of a married woman is " subject, as respects actions in tort between husband and wife, to the provisions of section 12 of the Married Women's Property Act, 1882." Thus the section is still with us, and, as a number of recent cases has shown, very much alive. That the question of the delictual liability between husband and wife has been so much in the legal " news " in recent years is obviously due to the fact that, in these cases, the spouses are often the parties to the dispute in no more than a formal legal sense. The practical importance of the problem arises frequently because on one side, usually that of the person liable, the interested party is an outsider, the insurer against third-party risk. Where one spouse causes an accident against the consequences of which he or she is insured by a third-party risk policy, and the other spouse, the victim of the accident, holds an accident policy, we may well get the edifying spectacle of two insurance companies facing each other as husband and wife by virtue of subrogation.[53] The fact that the insurer or insurers is or are interested parties has, of course, no legal significance whatsoever. Nor, as will be shown presently, would it be correct to say that, under modern conditions, the absurdities created by section 12 can only be discerned in accident cases.

That attempts should have been made to argue that *cessante ratione legis cessat lex ipsa*, is not surprising. Again and again counsel have tried to convince the courts,—and always in vain,— that the whole body of legislation on married women should be understood as a removal of the doctrine of unity and all its excrescences. The courts have invariably resisted such efforts to make them do the work of the Legislator. The decision of McNair J. in *Baylis* v. *Blackwell*[54] is only the last link (for the time being) in a chain which includes *Butler* v. *Butler*[55] and *Edwards* v. *Porter*.[56] The learned judge resisted the temptation to hold that " the process of encroachment or erosion has now, and, in particular, by the Law Reform (Married Women and Tortfeasors) Act, 1935, been carried

[53] In an accident policy there would, of course, have to be an express clause providing for subrogation which does not operate *ipso jure* in non-indemnity insurance.

[54] [1952] 1 All E.R. 74.

[55] (1885) 14 Q.B.D. 831.

[56] [1925] A.C. 1.

so far as to sweep away the last remnant of a wife's dependency on the husband and to destroy finally the legal unity of the spouses, . . ." How could he have done otherwise, in the face of the express reaffirmation of section 12 by the Act of 1935? How could he have held (as he was invited to do) that a man could, during marriage, start or continue proceedings against his wife for damages to compensate him for injuries suffered by him as a result of her negligence before the marriage? The courts may adapt rules they have made themselves to the changing requirements of public policy, and indeed they should.[56a] They may also adjust the interpretation of statutes to these needs. But if they started to repeal statutes in the light of what they consider to be public policy, justice, or any other "higher law," the law would be well on the way back to *Bonham's Case*,[57] and the "fundamental norm" of English law, which is the sovereignty of Parliament, would be in jeopardy.

It continues to be the law that, apart from the important exception to be discussed separately, husband and wife cannot, during marriage, incur any mutual liability in tort, and that they cannot, during marriage, start or continue proceedings against each other for a tort, whether it was committed before or during marriage. Much can be said in favour of the second of these two rules, provided it is kept in proper bounds. While they are living together, husband and wife should not be able to sue each other for assault or defamation or even for negligence. Nor, in the writer's submission, should questions of property be raised between husband and wife as matters of strict law. The rule against proceedings in tort between husband and wife operates, in so far as it applies to claims in detinue, conversion, trespass to land, ejectment, and nuisance, as a useful mitigation of the principle of separation of property.[58] Under the present law the husband does not against his wife dispose of those remedies with the help of which property is normally asserted and defended. Since in English law all judicial remedies for the defence of property are delictual, the effect of section 12 is to compel the husband to rely for the defence of his property against his wife on section 17 of the 1882 Act. According to this "in any question between husband and wife as to the title or possession of property, either party . . . may apply" to the court "and the judge . . . may make such order with respect to the property in dispute . . . as he thinks fit, . . ." If section 12 precluded proceedings in tort between the spouses altogether, it would, combined with section 17, lead to the desirable result that the rigid categories of the law of property are removed from their mutual relationship and replaced by the discretion of the judge,

[56a] As, *e.g.*, in *Rees* v. *Hughes* [1946] K.B. 517, where the argument *cessante ratione* succeeded in the Court of Appeal.

[57] (1610) 8 Rep. 114.

[58] See, *e.g.*, *Hutchinson* v. *Hutchinson* [1947] 2 All E.R. 792.

who can take into account their needs and their conduct. This, it is submitted, is a concession to the idea of the unity of the family which is entirely acceptable, and it is in fact the present law in so far as the husband's claims are concerned.[59] It would be a pity if section 17 fell a victim of any future law reform. Complaints for "personal torts" should go where they belong, *i.e.*, before courts exercising matrimonial jurisdiction which can apply the proper remedies, but not to a county court or to the Queen's Bench Division of the High Court. As regards these "personal torts" it is however arguable that the strict law of tort should apply between the spouses, once the "common establishment" has come to an end. In connection with claims based on property, the cases on the matrimonial home [60] have amply demonstrated the usefulness of the present provision which prevents a husband from suing his wife in tort even after a desertion or separation. In criminal law [61] mutual prosecutions between the spouses for larceny are precluded only while they are living together, and, after a separation or desertion, only with respect to offences committed while they still formed one household.[62] But it is suggested that actions for a tort concerning property rights should be barred even as between spouses who live apart, and that the Larceny Act should not, in this respect, be considered as a pattern for any future reform of what is now section 12 of the Act of 1882.

The trouble with the 1935 Act is not that it did not open the way towards proceedings in tort between the spouses, but that it did not abolish the common law rule against substantive liability (or, if one likes, the substantive implications of section 12 of the 1882 Act). As a result of this omission third parties continue to be affected by the rule that there can be no tort between the spouses. This observation is not by any means confined to the insurer who "stands in the shoes" of a spouse holding a third-party risk policy. Consider, for example, the position of a person who is alleged to have committed a tort against a married woman and who claims that the woman's husband was a joint tortfeasor, *e.g.*, in the event of an accident caused by the combined negligence of the husband and the third party, as a result of which the wife has suffered injuries. In *Chant* v. *Read* [63] the wife had been killed in the accident, and the question was, whether the widower was, as a joint tortfeasor, liable to contribute to the damages payable by the defendant to the plaintiff, the administrator of the wife's estate (who happened to be the husband himself,

[59] Not, however, where the issue arises in the course of an interpleader summons taken out by a third party: *De la Rue* v. *Hernu, Peron & Stockwell, Ltd.* [1936] 2 K.B. 164.

[59a] *Hutchinson* v. *Hutchinson, supra*; *Pargeter* v. *Pargeter* [1946] 1 All E.R. 137; *Stewart* v. *Stewart* [1947] 2 All E.R. 813.

[61] Larceny Act, 1916, s. 36.

[62] Except where the property was wrongfully taken by one spouse when leaving or deserting or about to leave or to desert the other spouse.

[63] [1939] 2 K.B. 346; [1939] 2 All E.R. 286.

a point relevant *sub specie justitiae*, but irrelevant *sub specie legis*). Whether the widower was so liable depended on whether he was, "or would if sued have been, liable in respect of the same damage." [64] This, in turn, depended on (a) whether, during her life, the wife had acquired a cause of action against her husband, and (b) whether, in virtue of the Law Reform (Miscellaneous Provisions) Act, 1934, the cause of action, if any, vested in her, survived for the benefit of her estate. On the latter point no difficulty arose: if the cause of action had been acquired by the wife, it survived her death. But on the first point Hallett J. held that no cause of action had been acquired by her. The learned judge relied on section 12, tacitly assuming that that provision reiterated the common law rule against substantive liability. The case was in fact correctly decided on the same common law principle as *Phillips* v. *Barnett*.[65] The point to be noted here is the great injustice which results from the ramifications of the substantive rule against tortious liability between the spouses: why should a third party be made to suffer as a result of the chance fact that the joint tortfeasor happened to be the victim's husband? This is aggravated by the fact that the third party cannot circumvent the rule by relying on the joint tortfeasor's fault as contributory negligence. In *Drinkwater* v. *Kimber* [66] both husband and wife sued the defendant for damages for personal injuries suffered by the wife in an accident caused by the defendant's negligence. The defendant alleged that the husband was partly to blame for the accident and counterclaimed against him, asking that he should be made to contribute towards the damages the defendant would have to pay to the wife. As a result of *Chant* v. *Read* the defendant was unable to base the counterclaim on the legal principles governing contribution between joint tortfeasors. He therefore claimed that he had suffered "damage" (*viz.*, his liability to compensate the wife for her injuries) as a result partly of his own and partly of the husband's negligence and relied on the Law Reform (Contributory Negligence) Act, 1945, section 1 (which is intended to yield a weapon of defence) as a weapon of counter-attack. Devlin J. held that this was not a case of contributory negligence, and that "damage" in the 1945 Act meant physical damage, not financial loss caused by the creation of a liability to a third party. The defendant's argument was a desperate and perhaps a slightly over-ingenious attempt to defeat the "unity" rule by a diversionary campaign in the land of contributory negligence. It was doomed to failure.

Observe further how the magic of the "unity" rule enables husband and wife to appear either as one person or as two, according to their convenience and usually to the detriment of the

[64] Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (*c*).
[65] Note 39, *supra*.
[66] [1951] 2 All E.R. 713; affirmed [1952] 1 All E.R. 701.

third party. Where the husband sues the tortfeasor for damages resulting to himself from a tort committed against the wife and where, as in *Mallett* v. *Dunn*,[67] the tortfeasor attempts to plead against the husband the contributory negligence of the wife, he is met by the doctrine of "non-identification" which the courts have laid down for cases of parent and child, of shipowner and cargo-owner, of carrier and passenger.[68] Suddenly the two are really two because the doctrine of unity does not apply in this case. Indeed, as Devlin J. said in *Drinkwater* v. *Kimber*,[69] "in this branch of the law husband and wife can both eat their cake and have it." Is it fanciful to suggest that legal "inconsistencies" are in most cases synonymous with "injustices"? Had the Act of 1935 been a bolder attempt to tackle the principle, had it been more than patchwork, the law would not only be clearer, it would also be fairer.

If section 12 of the 1882 Act were reduced to a rule of procedure, barring actions in tort between the spouses and possibly also between former spouses and their personal representatives, one of these grave injustices would be removed.[70] What is, however, much more important is the impossible situation created by the exception to the rule in section 12 to which we must now turn.

Liability in Tort: The Exception

The full wording of section 12 of the Act of 1882, in so far as it relates to the law of tort, is as follows. (This is the wording which the section has received by a consequential amendment in the Act of 1935,[71] an amendment which does not affect the points here under discussion):

"Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies . . . for the protection and security of her own property, as if she were a feme sole, but, subject as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

There cannot be very many enactments as difficult to construe as this.

In the first place, it is correct to say that, in so far as they relate to remedies and proceedings against any person other than

[67] [1949] 2 K.B. 180; [1949] 1 All E.R. 973.

[68] *Oliver* v. *Birmingham and Midland Omnibus Co.* [1933] 1 K.B. 35; *The Bernina* (1888) 13 App.Cas. 1; *Matthews* v. *London Street Tramways Co.* (1888) 58 L.J.Q.B. 12.

[69] At p. 715.

[70] Similarly, while s. 36 of the Larceny Act, 1936, is a rule of practical wisdom as a rule of criminal procedure, it is most undesirable that, as a result of its also being a rule of substantive criminal law, a receiver of property which in fact, though not in law, is "stolen," should go scot free: *R.* v. *Creamer* [1919] 1 K.B. 564.

[71] First and Second Schedules.

the husband, the words "every woman . . . shall have . . . the same civil remedies for the protection and security of her own property as if she were a feme sole" are "mere surplusage."[72] It is impossible to doubt that Lush[73] is right in saying that section 1 of the 1882 Act "would have been wide enough to include proceedings by the wife for the protection and security of her separate property without the aid of the 12th section."

We can take it, then, that the practical effect of this section has always been exclusively in the sphere of the mutual relations of husband and wife. But what is that effect? What, in particular, is the meaning of the crucial words "for the protection and security of her own property" which determine the limits of a woman's right to sue her husband for a tort?

It may be useful for a moment to look at these words without any reference to the decided cases and seek to understand what they could be held to mean if they had never been construed by a court. These words envisage the fact that all delictual claims serve the protection of certain specified interests. True, for historical reasons, the English law of tort is not throughout constructed as a system of protected interests. Some torts, such as trespass, conversion, detinue, and, up to a point, defamation, are defined in terms of the interest protected against the tortfeasor which, by being so protected, becomes a right. Other torts, *e.g.*, negligence, are formulated in terms of the tortfeasor's conduct and breach of duty. Nevertheless, it is, in all cases, possible to distinguish the various interests protected by law, even if some delictual principles are so designed as to protect a multitude of interests: a claim for negligence or for breach of statutory duty may serve to defend a person's interest in his bodily integrity or his property, while, *e.g.*, a claim for conversion always protects property. Section 12, one might further argue, gives the married woman the right to avail herself against her husband of all those delictual claims which are designed to protect property, *e.g.*, trespass to land or detinue, but of others only in so far as they do so *in specie*: she can never sue for assault, but she can sue for negligent damage to her goods, though not for negligent injury to her person. She might, as MacKinnon J. held in *Ralston* v. *Ralston*,[74] sue her husband for defamation if, but only if, the libel or slander is a direct or indirect attack on her property interests. This interpretation would not make section 12 less undesirable than it is, but it would make it, to some extent, comprehensible. It would yield a rational application of the section, and would, it seems, be in accordance with the intention of the statute which,

[72] These words were used by Wynn-Parry J., delivering the judgment of the Court of Appeal in *Curtis* v. *Wilcox* [1948] 2 K.B. 474; [1948] 2 All E.R. 574, 576, but they were used with reference to the words "except as aforesaid, etc." to which, with respect, they should not be applied.

[73] p. 581.

[74] [1930] 2 K.B. 238.

having made all property belonging to married women "separate property," went on to give them the remedy to defend it.

An action in tort, it has been submitted, is always brought for the protection of some interest which the law deems worthy of such protection. An action in tort, it is further submitted, is not brought for the protection of the right of action. If X sues Y for conversion, he protects his property, not his right to sue for conversion. If he sues him for libel, he protects his reputation, not his right to sue for libel. If I put on a raincoat, I protect my body against the rain, not the coat. This seems obvious, but it is put forward with some diffidence because of the decision in *Curtis* v. *Wilcox*.[75] In that case the Court of Appeal held, that since a woman's right of action in tort was a "thing in action" and therefore "property" according to section 24 of the 1882 Act, an action by a wife against her husband for damages for pain and suffering caused to her by his pre-nuptial negligence, was brought "for the protection and security of her own property," *viz.*, of her right of action.

This interpretation of the section had, as it were, been inherited by the Court of Appeal from the decision of McCardie J. in *Gottliffe* v. *Edelston*,[76] which the Court of Appeal overruled. The situation confronting McCardie J. was that a young man, driving a car, negligently caused an accident, apparently because he paid too much attention to the young woman who was his passenger and too little to other vehicles and to horses on the road. The young woman suffered serious injuries. Shortly afterwards they became engaged. This did not prevent the writ from being issued or the statement of claim from being delivered. The next step in the proceedings was the marriage, and after that came the delivery of the defence, which, many months later, was amended so as to plead that, as a result of the marriage, the action could not now be proceeded with. McCardie J. dismissed the action on this ground, *i.e.*, by reason of section 12 of the 1882 Act. It had been urged by counsel for the plaintiff that her right of action for negligence was an action for the protection and security of her property, on the ground that the right of action was a chose in action and hence "property" according to section 24 of the Act. The learned judge refused to act on this submission, rightly, it is suggested, but not for the right reasons. He held that the claim in tort was not, for the purposes of the Act, a chose in action,[77] but he did not say that, whether it was or not, the present action was not brought for its protection. He saw that if he acted as counsel for the plaintiff desired him to act, "the consequences would be striking. It would mean that although no husband can sue his wife for any tort whatsoever committed by her against him, whether before or during

[75] [1948] 2 K.B. 474; [1948] 2 All E.R. 574.
[76] [1930] 2 K.B. 378.
[77] At p. 391.

marriage, yet the wife can sue the husband for every tortious wrong against her before marriage, whether it be for negligence, libel, slander or assault." [78] This would indeed have been the consequence of a decision in the plaintiff's favour.

The facts in *Curtis* v. *Wilcox* were almost identical with those in *Gottliffe* v. *Edelston*. Again the sequence of events was: an accident caused by the negligence of the defendant, and resulting in injuries to the plaintiff, the issue of the writ, the marriage between the defendant (husband) and the plaintiff (wife), and then the trial of the action. The court overruled *Gottliffe* v. *Edelston* on the point that a delictual claim was a chose in action and hence property, but it did not even question the hypothetical conclusion drawn by McCardie J. that, if it was, the action for negligence would have been brought for its protection. On the contrary Wynn-Parry J., who delivered the judgment of the court, pointed out that, under the Act, the "right of action became part of her separate estate on her marriage" and that "she could reduce" it "into possession by action after marriage, such action being pursued for the purpose of securing that part of her separate estate." [79] "Under section 12 the right of suing which is given to a married woman extends, so far as concerns what may be the subject-matter of her action, to all her property." But, "the common law rule which otherwise" (*i.e.*, apart from the section) "still applies . . . would prevent a married woman from pursuing a purely personal claim against her husband, *e.g.*, for damages for libel or slander or assault." [80] These last words were, of course, *obiter*. It is not clear whether they were intended to refer to post-nuptial or to pre-nuptial torts. If they were meant to limit the effect of the decision as regards pre-nuptial torts, it is not clear why what applies to general damages for pain and suffering by reason of negligence should not also apply to defamation or assault, *i.e.*, in what sense these torts are more "purely personal" than negligence resulting in personal injury.[81] In the writer's submission, the decision of McCardie J. should not have been overruled, but the court should have disapproved of McCardie J.'s reasoning. It is respectfully submitted that the Court of Appeal was right in holding that a claim in tort is a chose in action. Nevertheless, in its result, the decision of McCardie J. would seem to have been correct because it is a fallacy to say that an action in tort is brought for the protection of the right of action.

If there is any merit in the point here submitted, it follows that *Curtis* v. *Wilcox* was wrongly decided because it rests on a fallacious reasoning in that it confounds the thing which protects with the thing which is protected. This might not be a decisive

[78] At pp. 390 *et seq.*
[79] [1948] 2 All E.R. at p. 574.
[80] *Ibid.*, at p. 576.
[81] See *per* McNair J. in *Baylis* v. *Blackwell* [1952] 1 All E.R. at p. 77.

argument against the judgment if it promoted substantial justice between the spouses. It is, however, also submitted that it has extended a palpable injustice which is inherent in section 12.

A comparison between *Curtis* v. *Wilcox* and *Baylis* v. *Blackwell* [82] shows that a married woman may, during marriage, recover damages from her husband for injuries suffered by her before marriage as a passenger in a car negligently driven by him, but that, in the reverse situation, *i.e.*, where she was the driver and he the passenger and the victim of the accident, the claim is precluded by section 12. This illustrates the most characteristic and the truly amazing feature of section 12, which is the rule of inequality it embodies. The tendency of all legislation on the relation between husband and wife has, ever since its first feeble beginnings in the Matrimonial Causes Act, 1857,[83] been in the direction of the equality of the sexes. Its aim has been to remove the inequalities which were imposed upon married women by the common law, and also by equity in the shape of the restraint on anticipation and alienation.[84] As regards the property relation between the spouses, the rule of equality is, in the present law, expressed not only in the Act of 1935, but also in the Administration of Estates Act, 1925, which deals with intestacy,[85] in the Larceny Act, 1916, which regulates the law of larceny as between husband and wife without discriminating between them, and in section 17 of the 1882 Act which makes it possible for the husband as well as the wife to invoke the discretion of the court in their mutual property relationship. Section 12, however, enacts a rule of inequality. What it says is, in effect, that the remedy provided by section 17 is the only and exclusive remedy a husband has against his wife with regard to his property, but that for the wife it is optional and that she may choose between relying on the discretion of the court and relying on the strict letter of the law. The husband who wishes to recover the matrimonial home from his wife in a case of separation or desertion must rely on section 17, a very beneficent rule indeed,[86] but the wife can evict the husband from the matrimonial home as a matter of right, if it is her property and if the matrimonial consortium has come to an end.[87] She can sue him for the return of movable property detained by him,[88] but he cannot even by a *quia timet* injunction prevent her from committing a tort against his property interests.[89]

[82] [1952] 1 All E.R. 74.
[83] ss. 21 and 26.
[84] Married Women (Restraint upon Anticipation) Act, 1949.
[85] s. 46.
[86] See cases quoted *supra*, note 60.
[87] *Shipman* v. *Shipman* [1924] 2 Ch. 140; *Boyt* v. *Boyt* [1948] 2 All E.R. 436. Here the court did have a discretion, but only on the ground that the remedy sought by the wife was an interim injunction.
[88] *Larner* v. *Larner* [1905] 2 K.B. 539.
[89] *Webster* v. *Webster* [1916] 1 K.B. 714.

Whether this violent swing of the pendulum from inequalities imposed upon the wife to inequalities imposed upon the husband was due to an oversight [90] or to an exuberance of feminism, need not and probably cannot now be determined. Nor does it matter very much : if it was true in the Victorian age that the female was in need of protection against her husband in circumstances in which he could be expected to look after his interests, it was certainly no longer true in the world of 1935. It was not as if the attention of the legal world had not been drawn to this injustice : it was castigated in detail in a monumental and masterly judgment [91] and also adverted to in the leading textbook,[92] quite apart from the mild and implied strictures administered by the Law Revision Committee.[93] Nevertheless it was perpetuated by the Act of 1935, and by the decision of the Court of Appeal in *Curtis* v. *Wilcox* its scope was very considerably enlarged.

How far has it been enlarged? How much remains today of the rule that a wife is not entitled to sue her husband for a tort? It was suggested above that *Curtis* v. *Wilcox* has eliminated the rule as regards all pre-nuptial torts alleged to have been committed by the husband against his wife. Any claim for a tort is a chose in action and therefore "property." Any action brought for the enforcement of that claim is said to be brought for its protection and security. One cannot avoid the conclusion that, on this reasoning, the wife may commence or continue any action against her husband based on a tort committed before marriage, whatever the nature of the tort. The Court of Appeal has in fact rewritten section 12. The rule has now been made to read: "No husband shall be entitled to sue his wife for a tort, and no wife shall be entitled to sue her husband for a tort committed after their marriage, except for the protection and security of her own property."

Curtis v. *Wilcox* refers to pre-nuptial torts only. It is based on the doctrine that, at the time of the marriage, a delictual claim vested in the wife and that that claim was the property she protected by her action. If the tort is committed during the marriage, the substantive common law rule against tort liability between husband and wife prevents the wife from acquiring a delictual claim. Hence it cannot, in that case, be said that by suing she seeks to protect or to secure an existing chose in action. It is only if the tort was an attack on her property (other than the tort claim itself) that she can sue the husband, as, *e.g.*, in cases of detinue, conversion, or trespass to land. Unless this is the proper interpretation of *Curtis* v. *Wilcox*, the decision has the more far-reaching effect, undoubtedly not intended by the Court of Appeal, that a

[90] Suggested by *Lush*, p. 583.
[91] *Gottliffe* v. *Edelston*, *supra*.
[92] *Lush*, pp. 583 *et seq*.
[93] *Supra*, p. 144.

wife has an unrestricted right to sue her husband for all torts committed during marriage.

The seemingly academic distinction between the substantive rule of the common law that husband and wife cannot commit torts against each other, and the procedural rule that they cannot sue each other for a tort, has thus become a matter of practical importance. Had the Act of 1882 abolished the common law rule against tort liability between husband and wife arising during marriage, had it merely enacted that they may not start or continue court proceedings against each other (except where she seeks to protect and secure her property), then, on the reasoning of *Curtis* v. *Wilcox*, there would have been no limit whatever to the wife's right to sue the husband for a tort. *Curtis* v. *Wilcox* lays down that, in view of the wife's right to sue for the protection of her property, there is no procedural obstacle to her action at all. All that prevents her from suing her husband for post-nuptial torts is the survival of the "unity" rule in its substantive aspect.

This substantive rule not only survived the 1882 Act, but was, as pointed out above, implicitly reiterated in section 12. The words "no husband or wife shall be entitled to sue the other for a tort" must be read as meaning "no husband or wife shall be entitled to claim against the other or to sue the other for a tort." That this is the correct reading of the section can hardly be doubted. If the rule merely barred proceedings and if it did not also bar substantive liability, then the exception too would have to be considered as merely procedural. It is, however, obvious, and the courts have, in any event since *Larner* v. *Larner*, held that the exception confers on the married woman a substantive right to obtain damages or an injunction against her husband for torts committed during the marriage. The exception being substantive, so is the rule.

All this is almost unbelievably and quite unnecessarily involved, and *Curtis* v. *Wilcox* has not made it any easier. As long as the House of Lords has not overruled it, the decision represents the law, whatever objections may be levelled against it. Fundamentally it is the legislature and not the court which is to be blamed for the present labyrinthine state of the law. It is time that the work begun in 1935 should be completed, and that the whole question of the mutual liability between the spouses should be re-examined and be regulated by statute. If and when this is done, the archaic and artificial remnants of the legal "unity" rule should be removed together with the anomalous inequality between the spouses which is laid down in section 12. Yet care should be taken not to destroy those principles and provisions which seek to give effect to the unity of the household which is a fact and not a fiction.

O. Kahn-Freund.[94]

[94] Professor of Law in the University of London.

THE HABITUAL PRISONER

THE Criminal is no longer regarded as a single social species and the study of his natural history—dating back to the time of Lombroso—is now seen to involve the investigation of a wide variety of human types, whose one common characteristic is that they have been convicted of breaking the law (even this single classification gets complicated as we look closer—the boy who rode his bicycle on the foot-path and was fined half a crown in the juvenile court hardly qualifies as a criminal—yet when we search for the boundary line of law-breaking serious enough to rank as crime we may find ourselves entangled in some such description as "finger-printable offences"). The fortress-like wall round a gaol, or the imaginary line marking the bounds of a prison camp tie up strange bunches of human beings; the pacifist whose convictions reject all form of conscription may walk at exercise with a reprieved murderer, the half-witted anaemic mother whose incompetent neglect of her children has amounted to cruelty may shoulder the woman of strong maternal feelings, but slender civic conscience, who has nourished hers on the coupons of half a dozen stolen ration books.

No one investigation can cover these varied characters. When we begin to consider the weaknesses which have led to their offences the clues carry us far back outside the gaol and we find each group of prisoners is linked to a class of free citizens with the same vulnerability—crime is not disease, but the analogies between them are often illuminating. If you look for the causes of malady amongst the patients of a prison hospital you are forced to consider the origins of cancer, of tuberculosis, or rheumatism in the population as a whole. Violence, jealousy, a reckless desire for adventure or a luxurious life are certainly not peculiar to Her Majesty's guests. They bring misery with them wherever they exist, but in some cases, their damaging effect is not of the kind with which the law can deal. For the purposes of research into their origins and nature the distinction between the anti-social behaviour which qualifies as "crime" and that which remains unpunished is of little importance.

But 200 years ago an inquiring man of science would have found one disease appearing mainly amongst prisoners—the gaol fever which was itself a result of incarceration. And today, as Dr. Norval Morris shows in his recent book,[1] there is a class of men and women (very few of the latter) conditioned by prison to prison, by crime to crime, till the first varied origins of their fight with society are almost lost in the uniformity of their present

[1] *The Habitual Criminal*, by Norval Morris.

behaviour. The habitual criminal can only be studied in the prison which is, in fact, almost his natural habitat. For many of them the author found that "extra mural life had become too much of a strain and that prison is the only life to which they have been trained and in which they find security. Consciously or unconsciously they desire it."

This selection of the subjects of his study differentiates Dr. Morris's book rather sharply from most modern inquiries into crime. All his cases were men of over 30: to trace out in detail the experiences of their early years or their probable inheritance would be impossible. It is, in a way, the haphazard system under which they were sentenced, the penal system itself, which is under inquiry, rather than the factors which originally brought them under its scope.

> The Criminal Court, then, achieves greater success as a fact-finding and law-applying agency than as a sentence-inflicting body. Its excellence in the former function springs largely from its unemotional, painstaking and objective approach; and it is submitted, its relative failure in choosing appropriate punishments arises from its emotional, expeditious and subjective reaction to the established offence and the convicted criminal. Until the unemotional, painstaking and objective approach is extended from the proof of the crime to the analysis of the criminal there will be no rational, functioning sentencing policy.

In this book exactly such an approach is made. The selection of cases bears the mark of a moment of transition in our penal system. It is common knowledge that the old form of preventive detention, a separate sentence following one of penal servitude (after a finding of guilt as an habitual criminal), was but little used. In October, 1948, at the time when this form of sentence was just being abolished by the Criminal Justice Act, the total number of men undergoing preventive detention was 32. All of them were interviewed by Dr. Morris, who collected from them and from their records a number of details throwing light on their past lives and on the effect—or non-effect—of their many sojourns in prison. His cases included a further 270 confirmed recidivists serving sentences in Wandsworth Prison, each of whom would under the 1948 Criminal Justice Act be liable to preventive detention under the new form as an immediate penalty. These men were studied for the most part in their records only. One of the challenging questions emerging from the inquiry is as to the reasons why the histories of this latter group show much more serious offences than those of the preventive detainees. Not that the detainees had not a heavy record of anti-social acts. Altogether over 3,000 offences are admitted to their discredit; they had been actually convicted of 1,085. Of these offences only seven could be construed as against the person, one wounding, two assaults, three of a sexual nature

and one cruelty to children. They were rather an abject little band; unemployed and mostly unemployable, unwanted and unsound. Indeed as a group they were "physically pitiable, being far less healthy than a group of similar age distribution taken from the general population." None of them was happily married or had any sort of home when out of prison. Not one of them had a decent record of work since 1930. Unfortunately no psychiatric research or mental tests were available but they are described as "far below standard mentality, and disturbed emotionally—though whether this has been a cause of their criminality or whether their lengthy prison sentences have been a cause of their many neuroses cannot be answered for the group; normally each had reacted unhappily on the other." But perhaps some sense of superiority is necessary to the maintenance of life—with one exception, the detainees showed a profound horror of the workhouse and contempt for its inmates whilst having no shame about prison.

Such was the catch of the old preventive detention net: "generally harmless and elderly men whose sole aim is to lead a quiet life" in the words of a Commissioners' Report. Will the much larger haul already being made by the new legislation resemble them? This is the question which we must needs ask in reading the second part of Dr. Morris's investigations into the 270 Wandsworth prisoners who would have been qualified for a sentence under the present law.

They were on the average younger men, the total of their offences, proved or "taken into account" reached 12,880 and on the whole these were more serious than those of the detainees, a much larger ratio being crimes against the person, whilst many of the crimes against property were of a very grave type. Their general health, though of an appreciably lower standard than that of the general population, was better than that of the detainees, as might be expected from their lower average age ($41\frac{1}{2}$ as against $50\frac{3}{4}$). Again, no mental tests were available, nor does there appear to have been any extensive psychiatric inquiry into their mental states. Seven had been at some time certified as insane, nine were border-line mental defectives, 40 could be classed as belonging to the "non-sane, non-insane" group, some being aggressive psychopaths. The group contained some men not completely deprived of normal home life, 57 lived with their wives (legal or *de facto*) when out of prison; but 88 bachelors and 21 divorced men and 10 widowers is a very high percentage of lone men out of 270: 195 were unemployed when they committed their last crime, and as a group their employment records were bad, though not as bad as those of the detainees (a result probably of better health and comparative youth). Such were the men of whom many are probably now serving sentences of preventive detention. Unfortunately one cannot form any high hopes of its curative effect, though mere old age has a tendency to promote respectability.

The recidivist is, by definition as it were, not an easily reformable person—preventive detention—old style—showed far more reconvictions than successes amongst those who were discharged. Amongst the two groups of recidivists studied by Dr. Morris an elaborate investigation showed that " the length of each period of penal confinement had no effect on the subsequent interval between discharge and reconviction." Finally of the eleven members of the group who had undergone corporal punishment all but two (who were punished for prison offences) again committed crimes of violence. The prognosis is emphatically not good. These are the failures of our society, whether by birth, by breeding or by punishment; it must be protected against them, but where deterrence by suffering or wretchedness has proved repeatedly futile, where punishment has completely failed, segregation should not be aggravated by useless penalties.

Most readers of Dr. Morris's book will probably first turn to this study of actual prison populations. But he has also given us a most valuable résumé of comparative legislation and practice with regard to habitual criminals in some other countries, with special emphasis upon the non-Asiatic British Dominions. Since within the Commonwealth New South Wales was the first country to introduce special legislation for dealing with recidivists the experience of this and the other Australian states is of particular value. The New South Wales provision that a person cannot be qualified as an habitual criminal unless his crimes include at least one serious offence against the person might well be more widely imitated; no other state has followed this example, though in several of them crimes of violence carry special weight in this connection. A study of this part of the book brings home vividly the paradox that, whilst some segregation of persistently anti-social characters has been considered needful for the safety of the public in almost every modern community, the measures devised for such segregation may become a greater threat to its well-being than the criminality they set out to repress.

Under Hitler's régime, in the five years from 1934 onwards, 7,657 persons were imprisoned under legislation dealing with recidivists. In 1938 the Minister of Justice exhorted the courts to make freer use of the sentence; in 1941 the decision as to release was given to an official in his ministry and the " protection of the community or the requirements of a just punishment " were made legal justification for death sentences on habitual criminals. The " savage and extensive use of the comprehensive habitual criminal legislation " by the courts of Italy under Mussolini was hardly less menacing. The habitual offender seems a milder evil than the potential oppression of such laws against him !

Even today in the Union of South Africa a considerable number of persons, the great majority of them non-European, serve indeterminate sentences for a third, or later conviction for any of

a list of offences ranging from rape and attempted murder down to theft of any kind. In 1946 their number was 1,836. Their régime differs little from that of other prisoners "unless indeed it be that the treatment accorded to habitual criminals is more disagreeable."

No doubt it is the possibility of such abuse that has moved legislators in most democratic countries to hedge round this form of sentence with rather exacting conditions. Dr. Morris discusses the different philosophies which underlie the systems of legislation dealing with habitual offenders and poses a number of pertinent questions. Is the sentence of preventive detention to be punitive in its aim, or should it be purely a measure of social security enforced with a minimum of discomfort to the segregated person? If the latter, should the "double-track" system of a punitive sentence for the present crime, followed by mere detention justified by previous crimes already "purged," be adopted (as in the former English system); or should the "one-track" system allow a change from an ordinary prison sentence at its beginning into a milder treatment at its close—as the regulations under the 1948 Criminal Justice Act seem to imply? Or can some better method than either be devised?

Does the transition from incarceration to even a supervised liberty put too heavy a strain on the man who has spent many years in prison? How could this be remedied? Should the sentence imposed by the court be indeterminate without maximum or minimum limits, its length dependent wholly on administrative decision, or should it be indefinite between limits? What should be the criteria for release? Can prediction tables be worked out, on the American model, to lessen the risks of prematurely opening the prison doors or of keeping them needlessly shut?

These questions are made more urgent by the greatly increased use of preventive detention in this country today: anyone to whom they appeal, whether from the legal or the penological point of view, will find Dr. Morris's book full of interest. We can only hope that he will follow it with further researches into allied questions carried out with the same scrupulous exactitude and sincere humanity.

Margery Fry.[2]

[2] J.P., M.A., LL.D.(hon.), D.C.L.(hon.); formerly Principal of Somerville College, Oxford, Governor of the B.B.C., and Hon. Secretary of the Howard League for Penal Reform.

CHATTELS AND CERTIFICATES IN THE LAW OF NEGLIGENCE

It has often been pointed out that the implications of the two great House of Lords cases in our modern law of tort are conflicting, and that when an English court is faced with facts which fall within the area of their contact, it will find great difficulty in coming to a decision which squares with them both. Such was the position of the Court of Appeal in *Candler* v. *Crane, Christmas & Co.*[1] last year. The "Neighbour" doctrine of Lord Atkin, supported as it was by the majority in the House of Lords in *Donoghue* v. *Stevenson*,[2] can and has been taken as justification for extending the range of liability in negligence, so that it has at last been invoked to support an action by a plaintiff who suffered financial loss through a public accountant's negligent misstatement. On the other hand, there is implicit in the language of the Lords of Appeal in *Derry* v. *Peek*[3] the proposition that misstatement lies properly in the realm of deceit and that persons who rely upon statements in business transactions should be protected from dishonesty but not from mere carelessness. One might repeat the words of Professor Paton: "After all, why should we treat the implication of *Derry* v. *Peek*[3] with greater reverence than the implication of *Donoghue* v. *Stevenson*[2]"?[4] It is difficult to see in what way the earlier case is of greater authority than the later, especially in view of section 3 of the Directors Liability Act, 1890, (now substantially re-enacted in section 43 of the Companies Act, 1948), which imposes liability on persons issuing a company prospectus in which false statements are made and reasonable care is not shown. The ground of the actual decision in *Derry* v. *Peek*[3] is thus removed. However, the arguments for and against the relegation of *Derry* v. *Peek* to the position of leading case on the internal content and not on the external range of a deceit action are lucidly and comprehensively laid out in such recent valuable articles as those of Professor Paton,[5] Mr. Justice Fullagar of the High Court of Australia,[6] and Dr. W. L. Morison,[7] and indeed in the judgments of the Court of Appeal in *Candler* v. *Crane, Christmas & Co.*[1] itself.

It is proposed here to carry the discussion one stage farther, and, assuming that the need for some limited principle of liability

[1] [1951] 2 K.B. 164.
[2] [1932] A.C. 562.
[3] (1888) 14 A.C. 337.
[4] (1951) 25 Austr.L.J. 292.
[5] "Liability in Tort for Negligent Misstatements," (1947) 25 Can.B.R. 123.
[6] "Liability for Representations at Common Law," (1951) 25 Austr.L.J. 278.
[7] "Liability in Negligence for False Statements," (1951) 67 L.Q.R. 212.

is admitted, to suggest the types of limitation that could be placed upon that liability, the practical problems that would arise from their application, and some difficulties of theoretical classification in a general scheme of tortious liability which would result. It will be assumed that it is open to the House of Lords to admit such a limited principle as that suggested by Denning L.J., in *Candler's Case*,[8] and that there is a social need for the protection of persons in the position of the plaintiffs in such cases as *De La Bere* v. *Pearson*,[9] *Le Lievre* v. *Gould*,[10] *Cann* v. *Willson*,[11] *Candler's Case* [1] and some of the American and Commonwealth cases. Professor Seavey has recently made an eloquent plea for this.[12] In the discussion that followed the decision by the New York Court of Appeals *against* liability in *Ultramares Corporation* v. *Touche*,[13] one American professional journal [14] actually urged the reversal of the decision, arguing that it is the claim of the accounting profession that its prepared statements be relied upon, and that it does not lie in its mouth to deny the duty of care it so insistently claims to perform. It is also an inference from the many attempts to attain the same result by different roads. Decisions which in their result support a principle of liability for negligent misstatement by professional men and public officials have been explained as going on implied agency [15] or third party benefit. *Glanzer* v. *Shepard* [16] is sometimes treated as going on the latter principle and the principles of the two types of liability are analogous, though not co-terminous. In any event, such a loop-hole is not available in this country, unless Denning L.J.'s remarks in *Smith* v. *River Douglas Catchment Board* [17] represent a possible development of English law on this subject. In American jurisdictions the definition of fraud is wide enough to cover many cases which in England

[8] [1951] 2 K.B. 164, at pp. 179 *et seq.*
[9] [1908] 1 K.B. 280.
[10] [1893] 1 Q.B. 491.
[11] (1888) 39 Ch.D. 39.
[12] "*Candler* v. *Crane, Christmas & Co.*: Negligent Misrepresentation by Accountants" (1951) 67 L.Q.R. 466. And *cf.* Fullagar J. *op. cit.* 282: "One must, I think, feel most reluctant to believe that under a developed system of law, a person in the position of the plaintiff in *Cann* v. *Willson* had no redress." A note in 65 Harvard L.R. 356 indicates that *Candler's Case* would have gone the other way, at any rate in New York.
[13] (1931) 255 N.Y. 170 (see pp. 175–76, *infra*).
[14] *The Certified Public Accountant*, Vol. 10, 228 (American). Compare (1951) 65 Harvard L.R. 356: "Imposition of this extensive duty of care could also be justified by the fact that third persons are virtually forced to rely on the representations of an accountant, because of the difficulty of checking the work independently. Moreover, the accountant's fee could properly reflect the severe risk to which he would thus be subjected, since it is the client who benefits directly from the wide circulation that can be given to an unqualified report."
[15] Thus *Humphrys* v. *Pratt* (1831) 5 Bli. (N.S.) 154 (where the House of Lords held for a sheriff who had lost damages in an action in trespass for taking A's goods when B, against whom a *fi. fa.* writ had been obtained and delivered to the sheriff, falsely represented they were B's own) was explained on this ground by Tindal C.J. in *Collins* v. *Evans* (1844) 5 Q.B. 820.
[16] (1922) 233 N.Y. 263 (see p. 173. *infra*).
[17] [1949] 2 K.B. 500, at pp. 514 *et seq.*

would not fulfil the stringent requirements of *Derry* v. *Peek*.[3] Thus the *Touche Case*[13] itself was sent back for retrial on the ground of there being evidence of deceit. *De La Bere* v. *Pearson*[9] is an example of a case of this kind succeeding as breach of contract, although the consideration of the contract was, to say the least, tenuous.[18] Williston[19] made as his chief argument against any liability in negligence for misstatement the fact that misrepresentation and negligence have proceeded along totally different lines in the common law. "There is a violation of historical continuity in forcing the two together."[20] Now there is no doubt that many possible situations are covered by the fact that negligence is redressible if within a contract. But the loss is the same and the plaintiff is not the less injured because there is no contract: what logic demands the limitation of liability to cases of contractual relationship and of actual dishonesty merely because the need for a further remedy came after the forms of action were fixed? Finally, many cases are of professional negligence; it seems well accepted that a doctor who writes a careless prescription is just as liable as if he performed a careless operation. But the categories of common callings are very limited and do not include the important professions of valuation and accountancy. As Professor Paton remarks: "It seems rather absurd that an independent duty of care in tort should be recognised only in those callings which were regarded as important in the formative period of the common law."[21]

It is hoped that enough has been said to show that there is a strong case for the law meeting a new social need which has only made itself felt in comparatively recent times, and that the existing remedies are inadequate. It is submitted that the claim for open recognition of some principle of liability in its own right, albeit a limited one, is sufficiently strong to warrant an examination of the possible ways in which it might be worked out.

One further preliminary point must be made. It seems probable that where the injury is physical, liability in negligence does not depend on it being caused by defendant's positive act and not his mere statement.[22] The argument that it is representation and not physical act which is the cause of the injury in such cases as *Donoghue* v. *Stevenson*[2] and *Watson* v. *Buckley*[23] is too well-known to merit discussion here.[24] But the proposition is a legitimate inference from more obvious cases such as *The Apollo*[25] (where admittedly the representor was in the public capacity of harbour-

[18] See the note in 23 L.Q.R. 138, and Dr. Morison in 67 L.Q.R. 217.
[19] (1911) 24 Harvard L.R. 415.
[20] *ibid.*, 436.
[21] 25 Can.B.R. 130.
[22] See, *e.g.*, Professor Lawson, *Negligence in the Civil Law* (1950), 34–6.
[23] [1940] 1 All E.R. 174.
[24] See, *e.g.*, Winfield, *Tort*, 5th ed., 1950, 392.
[25] [1891] A.C. 499. *Beven on Negligence*, 4th ed., Vol. 2, 1427.

master) and *Sharp* v. *Avery* [26] where the negligent representation that he knew the way was the only link between defendant's mistake in going off the road and plaintiff's injury on the following motor-bicycle.[27] But in any event, the important types of liability for negligent misrepresentation for which there is a social necessity will be almost entirely for financial loss, for loss of money in reliance upon the reports of accountants and surveyors. Roman law systems have less difficulty in treating physical and economic loss in the same way, although in practice the defences of contributory negligence and remoteness of damage (to use English terminology) may more easily succeed.[28] But the English courts are chary of allowing a general liability in negligence for financial loss. There is no hesitation in redressing it where the cause of action is deceit or conversion, but that a man should be saved from a bad bargain because of another's carelessness where he has not taken care to tie him down by contract is somehow abhorrent to the common law mind, at any rate in England. Where there is a contractual link, even though it has to be supplemented by a delictual link between the negligent party and the other contracting party, that has been sufficient to allow a claim for damages in negligence for purely economic loss: *Morrison* v. *Greystoke Castle*.[29] But it is difficult not to agree with Denning L.J. when he says: "I can understand that in some cases of financial loss there may not be a sufficiently proximate relationship to give rise to a duty of care, but if once the duty exists, I cannot think that liability depends on the nature of the damage." [30] Charlesworth's suggestion [31] that the mechanics of causation are more difficult to assess in such cases is not the real gravamen of the charge against pecuniary damage liability. The true difficulty lies in the *Re Polemis* [32] rule, the full injustice of which has not become apparent owing to the infrequency of its invocation in the courts. But once a duty is established under such a principle as will presently be argued, there will be liability for all direct damage. In the *Touche* [13] type of case this may amount to millions. However, the limitations suggested below would restrict the incidence of the *Re Polemis* rule, and the defences of contributory negligence and remoteness of damage are available, although the spreading of damage to another

[26] [1938] 4 All E.R. 85. The case is similar to Fullagar J.'s hypothetical case of the motorist asking the way, being mistakenly directed and wrecking his car in a deep hole in the road. Perhaps this could go off on remoteness of damage, or contributory negligence. See 25 Austr.L.J. 288.

[27] Dr. Morison (67 L.Q.R. 218–21) also suggests that a negligent misstatement may make plaintiff an invitee and thus impose occupier's liability, citing *Mountney* v. *Smith* (1904) C.L.R. 146.

[28] Such is, *inter alia*, the thesis of Professor Price in a series of articles in (1950) 67 S.Afr.L.J. 138, 257 and 411; (1951) 68 S.Afr.L.J. 78.

[29] [1947] A.C. 265.

[30] [1951] 2 K.B. 164 at 179.

[31] *The Law of Negligence*, 2nd ed., 1947, 16, cited [1951] 2 K.B. at 202.

[32] [1921] 3 K.B. 560.

interest than that originally invaded (if that be the true explanation of the *Liesbosch Case* [33]) would appear difficult to apply here. If in the result the Contributory Negligence Act cannot be invoked, and the damage is heavy, then defendant should not be morally excusable. Professor Price of the University of Cape Town, discussing the suggestion that there was liability in *Glanzer* v. *Shepard* [15] but not in the *Touche Case* [13] (both New York cases) because the harm was greater in the latter, says: "Frankly, the suggestion is preposterous. It asserts that 'the greater the possibility of harm, the less the liability.'" [34] And in the last resort the duty may be denied: such a practice is not unknown in the civil as well as the criminal law. Cardozo J. in the *Touche Case* [13] mentioned the fact that in the *Glanzer* v. *Shepard* [15] situation the value of the article in question was known or ascertainable, and the loss was insurable. This would apply to all cases. Lloyd's of London have a policy for accountants; the effect of such a liability if accepted would be a slight increase in accountancy fees, but also a corresponding tightening of the already high professional standards, more valuable reports and greater security for prospective shareholders and mortgagees. It is doubtful, if the limited scope of the doctrine is recognised, that business would take the gloomy turn predicted by Cardozo J. However, this inhibition is undoubtedly at the root of judicial conservatism in this matter, and it is for this reason that the limitations have to be introduced.[35] Comfort may be gleaned from Professor Paton's remark that tort is less amenable to arguments of abstract logic than any other branch of the common law, "because tort is, I think, the feminine section. It is not logical but rather wayward and exciting." [36] The possible practical limitations will be investigated first, therefore, before discussion of their juristic basis. For convenience of discussion the framework adopted by Denning L.J. in *Candler's Case* [1] will be followed.

(1) *By Whom Should A Duty Be Owed ?*

Denning L.J. in his judgment in *Candler's Case* [1] suggested that liability be confined to "those persons, such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts and other things, and to make reports on which other people—other than their clients—rely in the ordinary course of business." [37] The same type of limitation

[33] [1933] A.C. 449.

[34] (1951) 68 S.Afr.L.J. 88.

[35] Thus Prosser, *Torts* (1941), 733, describes the attitude of the American courts: "It is only where intangible economic interests are invaded that they have become alarmed at the possibility of liability of unknown and virtually unlimited extent, and have developed a more restricted rule. This has taken the form of limitation of the group of persons to whom the defendant may be liable short of the foreseeability of possible harm."

[36] (1951) 25 Austr.L.J. 293.

[37] [1951] 2 K.B. 164 at 179.

is contained in section 552 [38] of the Restatement of the Law of Tort of the American Law Institute, which is so clearly phrased and will be referred to so often in this paper, that it is proposed, at the risk of repetition, to cite it once and for all in full.

"One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if

"(a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and

"(b) the harm is suffered

(i) by the person or one of the class of persons for whose guidance the information was supplied, and

(ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith."

Thus Dr. Goodhart, in his note on *Candler's Case*,[1] refers to Lord Haldane's speech in *Nocton* v. *Ashburton* [39] and continues: "It is therefore open to the House of Lords to hold that such a special duty of care exists where the statement is made by a *professional man* [40] who knows that third persons will rely on his statement." [41] Dr. McKerron also suggests that *Candler's Case* might be reversed "on the ground that persons in the position of accountants who practise a *public or quasi-public calling* [40] owe a more extensive duty of care in regard to statements or certificates which they make or prepare in the exercise of their calling than ordinary persons." [42] One learned writer asks: "And why should this new load be fastened on the backs of professional men only and not on those of business men too?" [43] The reason surely lies in two facts. In the first place there is no general liability in English law for negligent misstatements, nor is such a liability urged by anyone. If there were, almost any idle remark in conversation would constitute a prima facie case of negligence. On the other hand, there is genuine hardship if persons advance money on the faith of certificates having all the appearance of authenticity and prepared by specialists who serve the public, and lose it

[38] s. 310 imposes general liability where defendant *knew* either that the statement was false, or that he did not have the knowledge he professed, while s. 311 imposes liability for failure to take reasonable care in making the statement upon a limited class: "one a part of whose business or profession it is to give information upon which the bodily security of others depends." These two sections refer only to *bodily* harm.

[39] [1914] A.C. 932 at 947, etc.

[40] My italics.

[41] (1951) 67 L.Q.R. 177.

[42] (1951) 68 S.Afr.L.J. 322.

[43] Mr. K. W. B. Middleton in (1951) 63 J.R. 182.

through the specialists' carelessness. It is for that reason that a duty-situation should be created for these professional men. It may be that the courts will find themselves justified in extending the class slightly: *Donoghue* v. *Stevenson* [2] itself has spread to repairers and controllers of dangerous chattels. The categories of "professional men" may remain to be filled as the course of litigation and public policy demand.[44] Thus it may be considered that company promoters and directors are not professional men, and *Derry* v. *Peek* [3] itself may stand on that ground. But the surveyor in *Le Lievre* v. *Gould*,[10] the valuer in *Cann* v. *Willson* [11] and the accountant in *Candler's Case* [1] are clearly within such a class. On the other hand, a newspaper proprietor who offers recommendations of financial speculations (*De La Bere* v. *Pearson* [9]) or racing information should clearly be excluded from this category.[45] In America the liability has been imposed on public weighers (*Glanzer* v. *Shepard* [15]) and doctors (*Edwards* v. *Lamb* [46]). The analogy with the duty of those in public callings is striking,[47] but the law on the subject is burdened with too much subtle learning to provide more than a rough guide for a duty-situation in negligence.

(2) *To Whom Should A Duty Be Owed?*

This inquiry is the most vital in this context. It is submitted that the normal test of foresight is inapplicable, and that in this respect the duty, if it be recognised at all, should differ sharply from that owed in respect of chattels. The manufacturer of chattels is liable to any person whom he ought reasonably to have foreseen might be injured by the dangerous chattel. Should the certifier of accounts be liable to anyone whom he ought reasonably to foresee would suffer harm from the false statement therein?

The dangers of over-generalising emanate not only from the inaccuracy of the generalisation itself, but often from the more insidious effect of it obscuring the intermediate area between atomisation and generalisation. The major exceptions of general liability for the consequences of an omission and for harm that is purely pecuniary, which must always qualify Lord Atkin's attempt to restate a general principle of liability in negligence [22] are too well known to lead to misapprehensions in citing *Donoghue* v. *Stevenson*.[2] But it calls for protest when the acceptance of the "Neighbour" doctrine and of Reasonable Foresight as the theoretical basis for the present categories of negligence leads to an unnecessary setback in the establishment of a new liability which,

[44] Lord Macmillan in [1932] A.C. 562 at 619.
[45] The fears, *e.g.*, of Sir John Latham (25 Austr.L.J. 295) would seem unjustified.
[46] 69 N.H. 599.
[47] Thus Fullagar J. (*op. cit.* 288) suggests that *Dickson* v. *Reuter's Telegram Co.* (1877) 3 C.P.D. 1, *Cann* v. *Willson* and *Le Lievre* v. *Gould* are not concerned with the rule in *Donoghue* v. *Stevenson* at all. "The cause of damage in cases like *Cann* v. *Willson* is not the making of a representation as such but the negligent performance of a task undertaken by the defendant."

while having all the appearance of being just another duty-situation in negligence, should in fact differ from the recognised categories in at least this one important respect.

Donoghue v. *Stevenson* [2] itself was a case of chattels put on to the market by a negligent manufacturer. No one claims that the liability which was imposed by the House of Lords in that case was an exercise in legal logic or a Blackstonian revelation : it was a conscious act of judicial legislation based on public policy and expediency. The defective condition of chattels, machinery and premises will inevitably cause physical harm to the person or property of those citizens who use them. It is the traditional province of the common law to protect subjects from such harm; it is only common sense to recognise that the average consumer in our industrial society would expect of those who supply him (for profit) with the articles and instruments that he needs a certain minimum standard not only of honesty but of care and skill; it is not unreasonable to require that minimum from such manufacturers and controllers. The recent decisions imposing stricter liability upon the occupiers and controllers of defective premises (*e.g.*, *Mint* v. *Good*,[48] *Heap* v. *Ind Coope & Allsopp, Ltd.*,[49] *Pearson* v. *Lambeth Borough Council* [50]) illustrate the social basis of the law in cases where physical harm is caused by the fault, whether actual or imputed, of him who controls the situation giving rise to that harm. But a comparison of the range of defences open to a defendant in a defamation action and to one sued in trespass indicates the different attitude which the law adopts in cases where there is no physical damage. Such a liability as that imposed for dangerous chattels is not desirable where the negligence lies in statement merely. So Judge Jeremiah Smith wrote as long ago as 1901 : " Even if the law recognises that there may be such a thing as a duty in the use of one's tongue, it does not necessarily follow that the duty should be held to be as universal and as far-reaching as the duty to be careful in the use of one's axe. The cases differ both in the stringency of the reasons for establishing a duty and in the weight of the burden which would thus be imposed." [51] These words of an American jurist put in a nutshell the argument of this paper. Yet there is implicit in the judgments in *Candler* v. *Crane, Christmas & Co.*[1] and especially in Asquith L.J.'s [52] discussion of the difficulties which the concept of proximity would create if brought into such a principle as was urged by counsel for the plaintiff in that case,[53] the underlying idea that liability for negligence in word must inevitably operate in the same way as that

[48] [1951] 1 K.B. 517.
[49] [1940] 2 K.B. 476.
[50] [1950] 2 K.B. 353.
[51] 14 Harvard L.R. 195.
[52] As he then was.
[53] [1951] 2 K.B. at 194–5.

for negligence in act. Small wonder that such a proposition met with a denial that was not even reluctant.

The compilers of the Restatement, commenting on their distinction between what is our *Donoghue* v. *Stevenson* [2] type of liability and that under discussion, say : " It comes from the fact that it " (*i.e.*, the information) " is supplied for guidance in a business transaction and not for guidance in a matter in which the safety of persons, land or chattels is involved." We can freely deny, with Bowen L.J., " that what a man writes on paper is like a gun or other dangerous instrument." [54] But the difference in modern society is not one of black and white : the shades of danger are relative and the law is not incompetent to recognise them. It is precisely because the law is more concerned with making physical harm actionable than with redressing a bad bargain that the scope of liability must be restricted. And this is not because the " dangerous thing " is in these cases intangible, but because it threatens business interests and not personal safety. The duty, if any, must not be imposed for reasonable foreseeability of reliance upon the statement but for some other relationship between plaintiff and defendant. Asquith L.J. was quite right in pointing out [55] that the " unidentifiability in advance " of the ultimate consumer of the ginger-beer did not displace the manufacturer's liability in *Donoghue* v. *Stevenson*.[2] But only in blind undiscriminating reliance upon Lord Atkin's dicta in that case can it be claimed that the liability of the manufacturer and the accountant should be identical. That such is in fact claimed is further proof of the weakness of our precedent system and the faith that it inspires in dicta instead of underlying principles.

Most critics of the dicta limiting the general principle of Lord Atkin (such as that of Wrottesley J. in *Old Gates Estates* v. *Toplis* [56] where he described it as " confined to negligence which results in danger to life, danger to limb or danger to health ") spoil their case. For the present purpose there is no need to deny these limitations: Lord Atkin himself referred to " injury to the consumer's life or property." [57] That is another argument. The question rather is: what *is* the principle to be applied to our new case if Lord Atkin's is inapplicable? The fact is that the majority speeches in *Donoghue* v. *Stevenson* [2] contain three separate propositions.

(a) The ratio itself was the addition of the manufacturer's duty to the categories of duty-situations. This was a conscious piece of policy law-making.

(b) Lord Atkin's broad phraseology indicates the general principles on which new duty-situations regarding physical

[54] [1893] 1 Q.B. 491 at 502.
[55] [1951] 2 K.B. at 194.
[56] [1939] 3 All E.R. 209.
[57] [1932] A.C. at 599.

danger can be created. He himself said that he was doing nothing more than attempting to find the common principle behind the then recognised categories, all of which concerned physical damage. This principle he found in the "Neighbour" doctrine.

(c) But there is assumed throughout an unconscious statement of the scope of the tort of negligence with which the dogma of foresight must not be confused. Foresight is an admirable and accepted criterion for damage to person and property: it cannot unthinkingly be applied to pecuniary loss. Herein lies the force of Charlesworth's thesis [58] that there is neither a general duty of care nor particular duties of care to prevent financial loss because such a duty would involve too great a liability in damages. Of course it would, were foresight the test. But the cases should not be equated. If they were, accountants would be liable for the triple indeterminate of Cardozo J.: "in an indeterminate amount for an indeterminate time to an indeterminate class." [59] But the recognition of the desirability of making actionable negligent conduct which results in damage *of any sort* (a recognition which was the "inarticulate major premise" of *Donoghue* v. *Stevenson* [2] and which was made belatedly by the common law) does not by any means involve the proposition that foresight is the only test for every type of negligence liability. To say that once an accountant is negligent he is liable for all foreseeable damage which is the consequence of his negligence is to take Lord Atkin's dicta further than was meant. He cannot have intended the breadth of his principle to have killed at birth different liabilities similar to the case with which he was dealing only in the negligent character of the conduct giving rise to them.

It is often said that there can be no negligence in the abstract. This enigmatic phrase has its true frame of reference in the classification of conduct and not in the imposition of liability. Its ambiguity is traceable to the *damnosa hereditas* of the old forms of pleading, to the double meaning of the word "negligence." No one can point to an act and say, ignorant of its circumstances and consequences, that it was in law a negligent act. The supreme proof of this lies in the infant cases like *Yachuk* v. *Oliver Blais* [60] where an act which would certainly have constituted contributory negligence in an adult did not deprive a child of his remedy. The careless character of the act must be ascertained by reference to some consequence of it: we use the test of whether a reasonable man would have foreseen the harmful consequences which someone in

[58] *Law of Negligence*, 2nd ed., 1947 14–16.
[59] 255 N.Y. 170 at 179.
[60] [1949] A.C. 386.

plaintiff's position might suffer as a criterion of the quality of defendant's conduct. But the further question, whether defendant should be liable for the consequences of his admittedly careless conduct, is a separate matter. The fixing of the nexus which will finally impose liability on a man guilty of careless conduct towards the victim of its consequences is a different inquiry altogether. In the normal case of manufactured goods the same test of foresight gives the radius required by the social need, for it covers the ultimate consumer or user. But this coincidence is the result of the expediency of the same test being suitable for both inquiries : it is not a necessary element of all liability for negligent conduct. There is no reason why the law, having selected a satisfactory test for the type of conduct it deems blameworthy, should not adopt a wider or narrower test for the establishment of the duty-nexus which will connect the careless conduct in law with the harm suffered (and this time, unlike the passive connection made to fix defendant's conduct as careless, an active onerary one). Whether it does so or not is entirely a matter of sociological expediency. To take a wider test is to abandon all incidence of the retributive principle and to trespass into the preserves of strict liability. But narrower tests are at hand to meet the need.

The possible tests seem to be five in number. In order of increasing stringency they are : reasonably foreseeable reliance, intended reliance, actually known reliance, requested reliance and contracted reliance. The first one, as will have appeared, is admittedly too wide for English law.[61] The last is admittedly too narrow. The choice remains between the other three.

(i) *Knowledge of Reliance.* This is Denning L.J.'s suggested test. " Did the accountants know that the accounts were required for submission to the plaintiff and use by him? "[62] Thus in *Candler's Case* the clerk Fraser knew this very well, and (on Denning L.J.'s view of the facts) the surveyor in *Le Lievre* v. *Gould*[10] did not know, because there was a reasonable probability of intermediate inspection. This is a pretty severe test which almost approximates to Dr. McKerron's view[63] that only the direct representee should have an action. Knowledge of reliance without necessarily knowing the identity of the person who relies

[61] Not apparently in South African law. So in *Perlman* v. *Zoutendyk* (1934) C.P.D. 151 at 161, Watermayer J. said: " We must assume . . . that the defendant knew, or ought to have known, that the signed certificate would or might be used by Pienaar for the purpose of borrowing money on the security of the land . . . it seems . . . clear that a sworn appraiser who is a reasonable man and knows that his certificate of appraisement is to be used for the purpose of inducing someone to lend money on the mortgage of the property valued by him, ought to foresee that a negligently made valuation assessing the property at a grossly inflated value is likely to mislead and cause harm to the mortgagee. Consequently . . . defendant was on the facts stated . . . under a duty towards prospective mortgagees to take care." But the plaintiff failed owing to contributory negligence and other factors inducing him to lend.

[62] [1951] 2 K.B. at 181.

[63] " Liability for Non-defamatory Statements," (1930) 47 S.Afr.L.J. 359 at 371.

is a difficult idea to grasp and judge, and it is the cases where the victim is "unidentifiable in advance" that demand a workable principle by which to draw the line. There is also the danger that actual knowledge may in a hard case slip into imputed knowledge,[64] and the wide arc of chattel negligence will open up.

(ii) *Requested Reliance.*[65] It may be that reliance at the representee's request would be enough. The normal situation of plaintiff asking for information from an accountant but without insisting on a contractual obligation would be covered (*e.g.*, *Candler's Case*,[1] *Le Lievre* v. *Gould*[10] and *Cann* v. *Willson*[11]). But the cases where the request is from an intermediate person, as in *Ultramares Corporation* v. *Touche*[13] and *Glanzer* v. *Shepard*,[15] would be left outside and while it is appreciated that some line must be drawn, it is submitted that there is no moral distinction between a man issuing a certificate to another at his request knowing or intending that a third party will rely upon it, and a man who issues it at the third party's request. Nor does logic or convenience demand such a distinction. It is suspected that such a doctrine is no more than a version of the old heresy of confining tortious liability in negligence to the scope of contractual liability, the "contract-tort *catena*."[66]

(iii) *Intended Reliance.* This is the test adopted by the restatement in section 552: "the person . . . *for whose guidance* the information was supplied" and who justifiably relies upon it "in a transaction in which it was *intended* to influence his conduct" may sue.[67] It is intention that is relevant: the link with deceit is clearly discernible. It is significant that while the restatement has two sections under the second division of torts (negligence) dealing with bodily harm from negligent misrepresentation, the section which deals with the type of case under discussion (section 552) is under the fourth division (Deceit: Ch. 22 Misrepresentations and Non-disclosure in Business Transactions; Topic 3 Negligent Misrepresentations). Liability then in America requires a different element than foresight of damage. It requires, like deceit, *intended reliance.* The distinction which must be drawn as to the persons to whom a duty is owed is found in the deceit cases. Why was there liability in deceit in *Andrews* v. *Mockford*[68] and not in *Peek* v. *Gurney*?[69] Because in the latter the prospectus was aimed at prospective applicants for *new* shares and was not intended to be

[64] This trend is clearly visible in occupiers' liability law: knowledge of a potential danger was equated to knowledge of actual danger in *Pearson* v. *Lambeth Borough Council* [1950] 2 K.B. 353.

[65] I am grateful to Professor Lawson for this suggestion.

[66] See, *e.g.*, Winfield, *Province of the Law of Tort*, 73–75.

[67] My italics. Denning L.J. said in argument in *Candler's Case* (at 173): "It would appear that the negligently made statement which is false must be made to the plaintiff and that the defendant must *intend or know*" (my italics) "that the plaintiff will act on it."

[68] [1896] 1 Q.B. 372.

[69] (1873) L.R. 6 H.L. 377.

acted upon by one who bought shares already on the market; while in the former the prospectus was repeatedly issued to rig the market, and any member of the public who acted upon it had an action, for he was intended to rely upon it. Intention and knowledge are equally hard to prove in evidence, yet there is a rich fund of experience in all the old deceit cases where the distinction has always been made. It is submitted that this is the most satisfactory test, and the best-known cases which the common law, here and abroad, has had to decide will be discussed from this aspect. They fall into two categories.

(1) *Where there is intended reliance by one person* [70]

The clearest case is where the misstatement is made directly to plaintiff, who is therefore identified in advance.

> *De La Bere* v. *Pearson.*[9] A negligently recommended a dishonest broker as reliable to B, a reader of his newspaper in which such recommendations were gratuitously offered. The case supposedly went on breach of contract, though it is hard to justify on that ground.[18]

The situation is indeed near to contract, though in many cases there would be no evidence of contract.

> *International Products Co.* v. *Erie R.R. Co.*[71] A's goods were about to be landed, and were to be bailed with B on arrival. B negligently misrepresented their location in reply to A's inquiry which B knew to have been made for the purpose of insuring them. In fact they had not yet arrived. Andrews J., giving the judgment of the New York Court of Appeals, held B liable for A's loss in failing to collect compensation on the policy when the goods were accidentally destroyed by fire. So at the time of the misstatement there was no relationship either in contract or bailment, but B patently intended his prospective client to rely on his statement. Quaere whether B could come within the professional category. If not, it is clear that even that limitation will not remove all injustices.

Another situation, still of direct statement, but not at direct request, is where A employs B to certify something and to give a copy of the certificate to C, who is to B's knowledge about to enter into some transaction with A on the strength of such certificate. This is the orthodox explanation of the next case.

> *Le Lievre* v. *Gould.*[10] B was appointed surveyor by A, a

[70] The cases where an agent is held impliedly to warrant his authority are really in this class (*Collen* v. *Wright* (1857) 8 E. & B. 647), but because there is liability irrespective of fraud or negligence, they have curiously escaped the effect of *Derry* v. *Peek* (Fullagar J., *op. cit.*, 283).

[71] (1927) 244 N.Y. 331.

builder-owner of property who was about to mortgage to C, and told to give a copy of his reports of building progress to C. After his appointment the mortgage deed was executed, containing a clause releasing C of his obligation to advance unless "his surveyor" certified progress. B was ignorant of this clause, and it must be inferred that C was intended by him to act upon the certificate, unless it can be extracted from the facts as stated that B was ignorant of the whole mortgage and proposed loan.[72] The Court of Appeal held B not liable to C for C's loss when the certificate turned out to be negligently erroneous. The case is probably an authority against the principle here argued.

Glanzer v. *Shepard*.[15] This is a similar American case, where a merchant A gave beans to a public weigher B to weigh, the weight to decide the price payable by C who had bought them from A. B, who was told of the sale to C, was instructed by A to send C a copy. C recovered the loss he made by paying the price according to the negligently overstated weight. There was no contract between B and C, although the return recited that it had been made "by order of" A "for" C. C's use of it was not, said Cardozo J. for the New York Court of Appeals, "an indirect or collateral consequence of the action of the weighers. It was a consequence which, to the weigher's knowledge, was the end and aim of the transaction."

It is into this class that the case which prompts this discussion falls.

Candler v. *Crane, Christmas & Co.*[1] A, B's accountant, issued negligently erroneous accounts on which he knew C would rely in advancing money to A. The Court of Appeal held by a majority that there was no liability in negligence. The important part of the facts is the following sentence: "The judge expressly found that, when the meeting of the 17th broke up, Fraser must have been satisfied, not only that the plaintiff was considering an investment in the company, but that he was taking with him and relying on the draft accounts which he had prepared."[73] Fraser was A's clerk. It will be noted that there is enough evidence as reported for finding an intention that C rely, although that specific question was neither put nor answered.

A further type of case in this class is where the misstatement is not direct, but goes through a third party, and where although the identity of the plaintiff is not known in advance, yet it is known

[72] Contrast the different conclusions of Asquith L.J. (as he then was) in *Candler's Case* (at 194) and of Fullagar J. (*op. cit.* 280).
[73] [1951] 2 K.B. at 167.

that only one person will be involved. The question is always one of intention, but since the prima facie evidence of intention (*i.e.*, directness) is lacking, there must be extraneous evidence of it from the circumstances and nature of the transaction.

> *Mulroy* v. *Wright*.[74] A knew that the certificate (stating property to be unencumbered) which he supplied to B, who was about to sell, was to be relied upon by the eventual purchaser. The Minnesota court held there was a duty of care despite the ignorance of the eventual purchaser's identity. The request theory would reverse this.

And this is the place of a celebrated case in the English textbooks.

> *Cann* v. *Willson*.[11] A, who wanted to mortgage Blackacre, was requested by his solicitors to get a valuation. He employed B to value and to send the report to the solicitors, who specially told B its purpose and the responsibility he was undertaking. The solicitors communicated the negligently false valuation to C, who made an advance on the strength of it. Chitty J. held B liable to C in the amount by which Blackacre proved insufficient to answer the loan. This too is counter to the request theory.

It is evident therefore that even where defendant does not deliberately and purposely place the certificate or information in plaintiff's hands, there may be further evidence of his intention (and, *a fortiori*, knowledge) that plaintiff rely on it, even in the absence of his knowledge of plaintiff's actual identity. It is interesting to find Lord Loreburn making the same point in a Scottish case about evidence of inducement in deceit: "He was none the less induced by the letter that it was not, in fact, either addressed to or seen by him, for its effect was accurately stated to him in pursuance of the writer's intention, and he acted upon it."[75]

(2) *Where there is intended reliance by a class of persons*

After stating his suggested principle in *Candler's Case*,[1] Denning L.J. continued: "Whether he would be liable if he prepared his accounts for the guidance of a specific class of persons in a specific class of transactions, I do not say. I should have thought he might be. . . ."[76] It is when we enter the domain of the last of Cardozo J.'s triple indeterminates that fears of such a principle getting out of hand may appear justified. But the element of intention is still useful as a limiting factor. Two leading cases from different sides of the Atlantic illustrate this.

> *Derry* v. *Peek*.[3] A, the director of a company, issued a

[74] (1931) 240 N.W. 116.
[75] *Robinson* v. *National Bank of Scotland*, 1916 S.C. (H.L.) at 184.
[76] [1951] 2 K.B. at 183–184.

prospectus upon which B, as a purchaser of shares, was intended to and did rely. Negligence was not pleaded as such, and the House of Lords held there was no deceit. No case could be clearer of a duty owed under our principle,[77] since the class of prospective shareholders was intended to rely, although the case does not fit the request theory. However, statute apart, a director is not one whose profession it is to supply information to the public, and is probably not one whose business it is to do so either. There was a different result in the American case.

Doyle v. *Chatham & Phenix Bank*.[78] B relied on A's certificate that a collateral security for bonds consisted in car dealers' notes. In fact they were worthless and the collateral insufficient. The New York Court of Appeals held for B in negligence. Kellogg J. for the court, said : " They were issued for the very purpose of establishing a relationship of trustee and *cestui que trust* between the defendants and persons who might rely thereon."

This is the place for a more recent, but no less controversial English case.

Old Gates Estates v. *Toplis*.[79] Promoters purchased Blackacre and employed a valuer Russell to value it. The company which was formed later failed to recover its loss from negligent over-valuation. Wrottesley J. said [80] : " Hutton " (one of the promoters) " had reserved Russell for the role of a person who was to appear as the independent valuer in the prospectus when the prospectus came to be issued, and this was indeed held out by Hutton to Russell as an inducement to him to give his advice. . . ." Russell knew the purpose of the report, but the negligence lay not in his own work but in the figures supplied by him to the anticipatory agents of the company themselves. It was a clear case of contributory negligence.

The difficulty is always to distinguish merely foreseeable and actually intended reliance. No case could be nearer the borderline than another New York case from which Cardozo J.'s judgment was much cited in *Candler's Case*.[1]

Ultramares Corporation v. *Touche*.[13] The Stern company employed public accountants A to draw up a balance sheet and

[77] See Cotton L.J., 37 Ch.D. 367–368. Fullagar J. says of the learned Lord Justice's proposition there: " If we examine it as an abstract proposition, we shall not immediately or readily say that it states a principle inappropriate to a great system of law or a principle ill-adapted to the use of those whose unenviable function it is to say justly whether a loss shall lie where it falls or be placed on some other shoulders than those of the immediate sufferer " (*op. cit.* 281).

[78] (1930) 253 N.Y. 369.

[79] [1939] 3 All E.R. 209.

[80] *ibid.* at 210.

> asked for 32 copies (it was a one-man company). The corporation advanced on the strength of this and was a victim of A's negligent error. The Court of Appeals held there was no liability in negligence. Cardozo J. said : " The defendants knew . . . that in the usual course of business the balance sheet when certified would be exhibited by the Stern company to banks, creditors, stockholders, purchasers and sellers . . . as the basis of financial dealing." But " nothing was said as to the persons to whom these counterparts would be shown on the extent or number of the transactions in which they would be used." Cardozo J. made two distinctions between this case and *Glanzer* v. *Shepard*.[15] One was that whereas there the upper limit of liability was fixed (*i.e.*, the value of the beans, a fixed and insurable sum), here it was not. The second was that the report was primarily for the information of the Stern company whereas in *Glanzer* v. *Shepard* [15] it was primarily for the third party's information.[81]

Obviously a one-man company has other uses in mind for 32 copies of a balance sheet (which in business circles is always meant for outside consumption) than self-gratification. But the extent of liability once admitted was enormous, and the lesson of the *Touche Case* [13] (which must go the other way if known and not intended reliance is enough and the irrelevance of the actual unidentifiability in advance of the plaintiff is copied from *Cann* v. *Willson* [11] and *Mulroy* v. *Wright* [62]) is that in this second situation, where a class and not one person is in question, stronger evidence should be required of intention of outside reliance. The fact may be important that the service was primarily rendered for the intermediary and the report not openly published. Thus in *Derry* v. *Peek* [3] the prospectus was issued with the direct benefit of the issuers in mind and was put directly into the hands of the prospective purchasers. These considerations do not weigh in *Candler's Case* [1] which is nearer to *Glanzer* v. *Shepard* [15] than to the *Touche Case* [13] in that only one person was aimed at.

(3) *In What Circumstances and In Respect of What Transactions Should A Duty Be Owed?*

(a) The statement must be in the course of the defendant's business. The man who invites the opinion of a valuer friend over dinner cannot justifiably expect more than honesty : if he takes it as a client at the valuer's office he is entitled surely to care and skill. Kerbstone opinion is clearly not included in the principle.

(b) The transaction in which the loss was suffered must be one in which the information was intended to induce action. This is

[81] See Professor Seavey's criticism of these distinctions in 52 Harvard L.R. 372 at 398–404.

the explanation of *Humphery* v. *Bowers*[82] and *Australian Steam Shipping Co.* v. *Devitt*.[83] In both cases a Lloyd's surveyor negligently passed a ship as within certain Lloyd's classifications of fitness. Plaintiffs were intended to rely on the statement, but only in transactions with Lloyd's for the purpose of registration, and not in preparing for voyages. It may be that the uncertain facts of *Le Lievre* v. *Gould*[10] may yield the conclusion that the certificates were issued to and at the request of the owner for the purpose of knowing how much he should pay the builder, and not so as to induce the mortgagee to advance money. Denning L.J. applies the same test to *Everett* v. *Griffiths*[84] in which the doctor of an insurance company certified insanity for the purposes of the insurance company only : the statement was not meant to be relied on in any other transactions. This really seems to dispose of the ubiquitous marine cartographer. Unless he is chartered to map for a specific expedition, there is no particular transaction in which it can be said that reliance was intended. It may be that the statement is so bound up with an act (such as the setting of instruments) that the case is removed out of misstatement into the field of physical negligence, as Dr. W. L. Morison suggests,[85] but otherwise it seems academic to talk of a map-maker being liable for the *Queen Mary* sinking.[86]

(c) The normal defences will be available, including remoteness of damage or insufficient participation in causation (*e.g.*, that other factors than the report induced the plaintiff's action). But the most fruitful one is contributory negligence. It might be said that a person who relies blindly on information supplied by anyone other than a professional man whose business it is to supply that type of information to the public is defeated by contributory negligence.[87] That would eliminate the necessity of limiting the liability to professional men and achieve the same result. In any event the availability of the defence has the effect of making the area of liability even smaller.

It is now submitted that it is open to the House of Lords to reverse *Candler's Case*,[1] or at least to adopt some narrower

[82] (1929) 45 T.L.R. 297.

[83] (1917) 33 T.L.R. 178.

[84] [1920] 3 K.B. 163; [1921] 1 A.C. 631.

[85] 67 L.Q.R. 221.

[86] Professor Seavey explains this as excluded by remoteness of damage (67 L.Q.R. 480), Asquith L.J. (as he then was) and Winfield (*Tort*, 392) treat it as nevertheless within the principle, Denning L.J. excepts it properly on the ground of no specific intended transaction.

[87] *cf.* Professor Price in the articles cited in note 28, *supra*. So in *Jaillet* v. *Cashman* ((1923) 235 N.Y. 511) an American court refused to impose liability for newspaper items or stock ticker reports, for reliance on such hasty statements is not justifiable. As Andrews J. said in the *Erie Case* : " the relationship of the parties, arising out of a contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care."

principle, and to restore *Derry* v. *Peek*[3] to its rightful place as the leading case on deceit. We seem today to be nearing the fulfilment of Pollock's hope[88] that *Derry* v. *Peek*,[3] if it delayed, would not altogether prevent the working out of a principle of negligence in word : professional opinion is more favourable than it was, say, 30 years ago. Study of the American authorities is helpful in this connection, and it is hoped that the foregoing discussion has suggested some of the lines that such a principle could take and the practical results of its adoption.

Finally, supposing that a principle such as that outlined here or that suggested by Denning L.J. with the immediate approval of many learned writers,[89] is incorporated into English law by a House of Lords decision, how would it square with theory? In the usual terminology, a new duty-situation would be created. The basis of choice of these " categories of negligence " is obscure : it would seem to be policy and the analogies of precedents. But would it be true to say of the suggested new category that Lord Atkin's indication of when liability arises within the situation holds? The question of which comes first, duty of care or foreseeability, is a conundrum the answer to which is unnecessary to the point made here.[90] A new liability is being discussed by lawyers which they are prepared to recognise, if they recognise it at all, as another example of negligence. And yet none of its advocates claim that the accountant should be liable for all foreseeable injury resulting from the use of his certificate in the same way that the manufacturer is liable for all foreseeable injury resulting from the use of his chattel. Foresight in the former case would only be relevant to the question whether defendant's conduct was sufficiently careless to deserve legal recognition as such, and not to the question whether liability will be imposed for it. That final step would go on intention, or knowledge, or request. The difficulty of the matter may lie in the fact that since this part of the law is at a formative stage, the courts are jealous to treat most questions as questions

[88] *Tort*, 14th ed., 444 *et seq.*

[89] *e.g.*, Dr. Goodhart (67 L.Q.R. 177), Professor Seavey (67 L.Q.R. 466), Dr. McKerron (68 S.Afr.L.J. 320) and Dr. Street (14 M.L.R. 345).

[90] See, *e.g.*, Buckland, *Some Reflections on Jurisprudence*, 110–115, and Lawson, *The Duty of Care in Negligence* (1947) 22 Tulane L.R. 111. Thus Dr. McKerron says of *Candler's Case* that it " illustrates a point which is often overlooked, namely, that the requirement of a duty of care serves a twofold purpose. In the first place, it serves to determine whether the damage done to the plaintiff is imputable to the defendant. Secondly, it serves to determine whether the defendant's conduct is to be adjudged wrongful in relation to the plaintiff; in other words, whether the situation is one in which the plaintiff should be accorded a remedy. The second aspect is logically anterior to the first: the court is not called upon to pass upon the question of imputability until it has first decided whether the defendant's conduct is capable of entailing liability. So far as the first aspect is concerned, the test is the foresight of a reasonable man; situated in the same circumstances as the defendant. So far as the second aspect is concerned—the aspect with which the instant case was concerned—there is no acid test: in the absence of precedent it is a question of judicial policy " (68 S.Afr.L.J. 324).

of law and not as questions of fact. The existence of a duty of care is a question of law; the existence of contributory negligence or remoteness of damage is one of fact. So a system by which there is prima facie duty wherever there is foreseeable injury from defendant's conduct, whether by act or word, breach of which is not redressible where plaintiff's conduct was itself unjustifiable or other causes operated concurrently to effect the injury, is denied us.[91] The limitations which logically are better when operating outside the duty and narrowing its radius from the outside, must in this case be brought inside the duty to operate internally in its definition and imposition. The result does damage to the symmetry of the Esher-Atkin definition. It is suspected that such a development in English case-law would go a long way to assist the academic lawyers in the struggle to isolate the juristic basis of negligence liability, and that it may be discovered that the Esher-Atkin definitions do not after all exhaust the field even acknowledging their admitted shortcomings in the matters of omissions and pecuniary loss. Perhaps the new action, if it be admitted, will be placed alongside deceit or liability in common callings, or made a liability *sui generis*, but the juristic basis of attaching liability to carelessness in a more limited area than that of foresight will remain to be solved.

R. G. Wilson.[92]

[91] This is the theory advanced by Professor Price: it is certainly more true of the majority of civil law systems than of the common law.

[92] B.A.(oxon). Mr. Wilson is at present reading for the degree of B.C.L. at Brasenose College, Oxford.

WHAT IS INCOME?

"THERE can be no doubt that, in the natural and ordinary meaning of language, the income of a bank or trade for any given year would be understood to be the gain, if any, resulting from the balance of the profits and losses of the business in that year. That alone is the income which a commercial business produces, and the proprietor can receive from it." [1]

This is only one of many judicial definitions of income,[2] apart from innumerable definitions not by words, but by implication. The distinction of income from capital is, ultimately, an arbitrary one, as Lord Herschell saw in *Bouch* v. *Sproule*.[3] In their attempts to make it the judges have referred inter alia to the opinions of economists [4] and of judges in other jurisdictions, especially the United States of America.[5] The doubtful compliment is returned, as witness Lord Keynes [6]: "Our definition of *net income* comes very close to Marshall's definition of *income*, when he decided to take refuge in the practices of the Income Tax Commissioners and—broadly speaking—to regard as income whatever they, with their experience, choose to treat as such. For the fabric of their decisions can be regarded as the result of the most careful and extensive investigation which is available, to interpret what, in practice, it is usual to treat as net income."

But whilst economists and others may take refuge in judicial decisions, the judges can find no refuge from their function of

[1] Sir Montague E. Smith, *Lawless* v. *Sullivan* (1880) 6 A.C. (J.C.) 373, 378–379.

[2] A representative assortment may be found in *Words and Phrases Judicially Defined*, 1944 ed., by Sir Roland Burrows, Vol. III, pp. 80–84.

[3] (1885) 12 A.C. 385, 393: "The division of the enjoyment of property between tenant for life and remainderman is itself artificial."

[4] See, *e.g.*, Sankey J. in *Pool* v. *Guardian Investment Trust Co., Ltd.* [1922] 1 K.B. 347, 359.

[5] In *I. R. Comrs.* v. *Blott* [1921] 2 A.C. 171, Lord Finlay at p. 195 quoted Pitman J. in the United States case of *Eisner* v. *Macomber*, 252 U.S. 189, 207, 1920, as saying: "Here we have the essential matter; not a gain accruing to capital, not a growth or increment of value in the investment, but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested or employed, and coming in, being 'derived' that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal; that is income derived from property. Nothing else answers that description." In *Pool* v. *Guardian Investment Trust Co., Ltd.* [1922] 1 K.B. 347, Sankey J. at p. 358, after quoting various definitions by economists, repeated the words of Pitman J., and particularly stressed that "the essential matter is that income is not a gain accruing to capital, but a gain derived from capital." This is very subtle. He then enunciated what he called "the true test as to whether a distribution of shares falls to be taxed," which he concluded depends on two questions: (1) whether there has been a release of assets, (2) if so, whether the assets released were capital.

This test is criticised by Professor Bailey in his article on "Settled Shares in a Company," 67 L.Q.R., April, 1951, p. 195. To Professor Bailey's detailed discussion of this whole subject my debt is both real and apparent.

See also W. Strachan, 46 L.Q.R. 334.

[6] *The General Theory of Employment, Interest and Money*, 1944 ed., p. 59.

making decisions on the facts before them which, for good or ill, declare the law for the future. The danger that isolated decisions on particular aspects of a subject may not harmonise when placed beside each other is inherent in the inductive process of the English courts and it is submitted that this is the position today in respect of decisions on capital and income in the two fields of trusts and taxation. The following singularly inconsistent rules may be extracted from these decisions, of which rules (1), (4) and (6) appear to merit particular attention.

1. If a company pays a dividend from profits in cash or in stocks or shares in another company (hereafter referred to as "extraneous stock or shares"), such payments are income in the hands of a trustee shareholder, who must hold them for the exclusive benefit of the tenant for life,[7] even though the "other company" is, as the result of nationalisation legislation, the compulsory statutory successor to the first company.

Although the capital value of the shares may fall considerably after the announcement of such a dividend, no apportionment between tenant for life and remainderman will be ordered unless a breach of trust by the trustee can be proved.[8]

2. If, however, the shares in the original company are bought with capital moneys for an investment, at a time when the purchaser knows that a distribution of such extraneous stock or shares is contemplated, the stock or shares later distributed will also be capital and the tenant for life cannot claim them or the proceeds from their sale.[9]

So also if the profit accrues in respect of a particular transaction which was completed before the death of the testator (in the case of a settlement by will), and the payment in cash or extraneous shares is made after his death, such payment forms part of the settlor's capital estate, and is not income of his residuary trust fund.[10]

[7] *Maclaren* v. *Stainton* (1861) 3 De G.F. & J. 202; *Re Piercy* [1907] 1 Ch. 289; *Re Bates* [1928] Ch. 682; *Hill* v. *Permanent Trustee Co. of New South Wales, Ltd.* [1930] A.C. 720 (J.C.); *Re Doughty* [1947] Ch. 263 (C.A.); *Re Harrison's Will Trusts* [1949] Ch. 678; *Re Sechiari* [1950] 1 All E.R. 417, 66 T.L.R. (Pt. 1) 531.

In *Re Sechiari* the only authority quoted was the decision of the Privy Council in *Hill* v. *Permanent Trustee Co. of New South Wales*. That decision, however, approved *Re Bates*, which appears to have been decided on the sole authority, then 67 years old, of *Maclaren* v. *Stainton*, on which see *post*.

[8] *Re Sechiari* [1950] 1 All E.R. 417; *Re Kleinwort's Settlement Trusts* [1951] Ch. 860; *Re Rudd's Will Trusts* [1952] 1 All E.R. 254.

[9] *Re Maclaren's Settlement Trusts* [1951] 2 All E.R. 414: a salutary decision, in which Harman J. rejected a claim by the tenant for life, based on the decision in *Re Sechiari*, to snatch an even quicker profit at the expense of remaindermen in this type of transaction.

[10] *Re Winder's Will Trusts* [1951] Ch. 916: an extension of the decision in *Re Muirhead* [1916] 2 Ch. 181, in which it was held that the Apportionment Act, 1870, applied to a dividend declared after the death of a tenant for life in respect of a period completed before his death, so that the whole of the dividends accrued to the estate of the tenant for life. The facts in *Re Winder's Will*

3. If the amounts received by the tenant for life under (1) above are profits of trade, for which the company is liable to income tax, they form part of his income for tax purposes whether received in cash or in shares in another company.[11]

4. But if they represent sums on which the company is not liable for income tax, but which are capital profits, either made in past years and retained to increase the value of the company's assets, or realised on a sale of assets, although they are income in the hands of a trustee shareholder and payable to the tenant for life, in the hands of the latter they become capital and not subject to any tax.[12]

5. Whatever the origin of the profits from which a dividend is declared, if at the time it is declared the shareholders are invited to reinvest the dividend in newly issued shares in the company, then the company is said to have "capitalised"[13] these sums; the new shares are therefore capital in the hands of a trustee shareholder, who must hold them for the benefit of the remainderman.[14]

Trusts were distinguishable on several grounds from those in *Re Jowett* [1922] 2 Ch. 442, in which the operation of the Apportionment Act was restricted, as regards dividends, to those expressed to be made in respect of some definite period.

[11] *Pool* v. *Guardian Investment Trust Co., Ltd.* [1922] 1 K.B. 347; *Briggs* v. *Comrs. I.R.* (1932) 17 T.C. 11. The procedure in fact adopted is that, whether the company deducts income tax from the shareholder or not, when paying dividend:

(1) The shareholder's net receipts in respect of the company's trading profits are "grossed up" for the purpose of computing his income, on which he may be liable for tax at the standard rate, or a lower rate, or the higher rate now known as surtax (formerly super-tax); and
(2) he is credited with payment of tax at the standard rate on such receipts;
(3) if, because of the smallness of his total income, he is liable only at the lower rate, he receives a rebate of tax, whereas if he is liable to surtax an additional demand is made upon him.

But note Finance Act, 1922, s. 21 (as amended), under which a company's undistributed income may, in certain circumstances, be treated as that of its members.

[12] This appears always to have been practice accepted by the Crown. In *Gimson* v. *I.R. Comrs.* [1920] 2 K.B. 246, 248, the Crown did not dispute that dividends of a capital nature were not assessable to income tax; in *Neumann* v. *I.R. Comrs.* [1934] A.C. 215, Lord Tomlin said at p. 228: "It is not disputed that if a dividend is paid out of profits produced by a sale of a capital asset it is not made out of profits or gains charged on the company, and therefore no deduction from the dividend is authorised and the dividend itself is not liable to be taken into account in fixing the liability to surtax of the shareholder."

There seems no logical reason why, because capital profits are exempt from tax on income when in the hands of the company, they should necessarily be exempt in the hands of the shareholders, since the company holds its assets in its own right and not as agent for the shareholders. The rule may be an anomalous survival from the former doctrine that the company paid tax as an agent of its shareholders (see *Gilbert* v. *Fergusson* (1881) 7 Q.B.D. 562. This theory, frowned upon by Lord Cave in *Blott's Case*, is now discarded, see *Barnes* v. *Hutchinson* [1940] A.C. 81, and Farnsworth's *Income Tax Cases*).

[13] An expression much distrusted by Lord Dunedin and Lord Sumner; see note 30, *post*.

[14] *Bouch* v. *Sproule* (1887) 12 A.C. 385; and this is so even if the tenant for life has been left "dividends, bonuses and income," *Re Speir* [1924] 1 Ch. 359, C.A.

6. In the case of (5) above, no tax on income is payable by the recipient of the dividend so reinvested.[15] And this is so even if the company gives shareholders the option of taking up the new shares or receiving the dividend in cash,[16] at least as regards those who take shares, and possibly even those who take part cash and part shares.[17]

Nor is such tax payable if the profits are distributed in the form of debenture stock,[18] and this may still be so even if the debentures are repayable at short (*e.g.*, one month's) notice[19] (*sed quaere*).

7. If a company ceases trading and distributes capital profits before winding up, they will be income in the hands of a trustee shareholder and come under rules (1) and (4) above[20]; after winding up, however, any assets distributed are capital, and no tax on income is payable on them.[21]

8. If a company issues shares at a premium, the premiums received must be transferred to a share premium account[22] which for practical purposes is regarded as issued share capital.

Provided the requirements of the Companies Act, 1948, s. 66, are fulfilled, a company may always reduce its share capital with the sanction of the court, which is in practice never refused where the statutory requirements have been complied with, and this is so even where the reduction is disadvantageous to certain classes of shareholders[23] or is manifestly designed to evade the payment of profits or other taxes, or to evade, *e.g.*, possible nationalisation.[24] Money distributed to members either by way of return of capital

15 *I.R. Comrs.* v. *Blott* [1921] 2 A.C. 171.

16 *I.R. Comrs.* v. *Wright* [1927] 1 K.B. 333, C.A.

17 Rowlatt J.'s decision to the contrary in *I.R. Comrs.* v. *Coke* [1926] 2 K.B. 246 was impliedly frowned upon in Scrutton L.J.'s judgment in *I.R. Comrs.* v. *Wright* [1927] 1 K.B. 333, C.A.

18 *I.R. Comrs.* v. *Fisher's Executors* [1926] A.C. 395.

19 So held by Rowlatt J. in *Whitmore* v. *I.R. Comrs.* (1925) 10 T.C. 645; but Macnaghten J. decided the other way in *Aykroyd* v. *Comrs. I.R.* [1942] 2 All E.R. 665, in which *Whitmore's Case* does not appear to have been cited. Rowlatt J. had followed the *ipsissima verba* in *I.R.Comrs.* v. *Fisher's Executors* of Lord Sumner, who there generalised the result of the majority decision in *Blott's Case*, with which he had expressed emphatic disagreement at the time. See *post*.

20 *Hill* v. *Permanent Trustee Co. of New South Wales* [1930] A.C. 720.

21 *I.R. Comrs.* v. *Burrell* [1924] 2 K.B. 52, C.A. But notice that the company's income is to be regarded as that of its members may still be served in respect of profits made by a company in the past under Finance Act, 1922, s. 21. See note 11, *supra*.

22 Companies Act, 1948, s. 56.

23 *Scottish Insurance* v. *Wilsons & Clyde* [1949] A.C. 462; *Prudential Assurance* v. *Chatterley-Whitfield Collieries* [1949] A.C. 512.

24 *Ex p. Westburn Sugar Refineries, Ltd.* [1951] A.C. 625. See the analysis of this case by Professor Gower in (1951) 14 M.L.R. 330. This rule is an extension of that in *I.R. Comrs.* v. *Blott*, which, although it clearly established that a taxpayer is entitled to adopt any measures of tax evasion he can devise which are not contrary to a rule of law, yet did not involve the direct association of the court in the evasion.

or from share premium account is capital and not income,[25] and this applies both as between the tenant for life and the remainderman, and the recipient and the Revenue authorities.

Let us first consider Rule 6, that " bonus shares " do not attract income tax.

The history of this rule leads through some unfrequented by-ways in the doctrine of precedent. In *Blott's Case*, Lords Haldane, Finlay and Cave were opposed by Lords Dunedin and Sumner[26]; and since in their Lordships' House right dwells with the majority, victory lay with Lord Haldane and his supporters, and their decisions have since been law, including Lord Haldane's statement that: " It is by no means certain that the majority in such a general meeting would consist of persons liable to super-tax and assembling to devise a method of escaping it. Why, as a matter of law, if they were such, they should not attempt to escape it by any means that is not made unlawful I do not see." Five years later it was the dissentient Lord Sumner who led the House that reaffirmed and extended the rule in *Blott's Case* to mortgage stock in *I.R. Comrs.* v. *Fisher's Executors*, and he there spelled out the consequences of the majority decisions in *Blott's Case* with a meticulous precision, not to say an emphasis, that would seem to have been born less of conviction than of distaste.

This line of cases also throws some instructive sidelights on the use of fictions. Thus the majority in *Blott's Case* relied on the magic of " capitalisation "[27]; to this the dissentients objected[28]

[25] *Re Duff's Settlement* [1951] Ch. 923, C.A. At first instance Harman J. considered that the second rule laid down in *Hill* v. *Permanent Trustee Co. of New South Wales, Ltd.* must now be modified, as in the light of s. 56 it is no longer true to say that there is not any means other than a reduction of share capital of parting with money to shareholders except by way of dividing profits. The Court of Appeal, however, held that a distribution among shareholders of part of the share premium account must be treated as if the company were paying off paid-up share capital and specifically affirmed the Privy Council decision in *Hill* v. *Permanent Trustee Co.*, which after exerting for some years a considerable influence in the High Court now becomes legitimated by adoption in the English courts.

[26] The decision incidentally puts quite out of court those " realists " who contend that political prejudice dominates judicial decisions. There seems little reason to assume that Lord Sumner was less sympathetic to the aspirations of the super-tax payer than Lord Haldane or any of his brethren who agreed with him, and Lord Sumner explicitly rejected such a suggestion at [1921] 2 A.C. 207: " There is not the slightest evidence that liability to super-tax was ever thought of by anybody. People who pay super-tax do not usually get much consideration from people who do not."

It might, however, be more colourably suggested that while Lord Haldane and his colleagues relied finally on the maxim that a taxing statute must be strictly construed, the unspoken premiss of Lords Dunedin and Sumner may have been that the law, even if enacted by a legislature untutored in the finesses of financiers, should be obeyed.

[27] At pp. 182, 186, 193–194, 200.

[28] Lord Dunedin said at p. 203: " I confess I am shy of the word ' Capitalise.' It seems to me to leave one in a hazy state of mind as to what is the legal operation which is so described." Lord Sumner, at p. 207: " To call it ' capitalisation ' is neither here nor there, for, apart from the Companies Acts, profits may be capitalised in more ways than one."

as they did also to the continuous references to "the intention of the company", and to "bare machinery."[29] But in *Fisher's Case* Lord Sumner wove into his judgment (not, it is submitted, without a considerable undercurrent of scepticism) most of the fictions he had previously torn aside,[30] and in some of the later cases these assumed an even greater measure of unreality.[31]

From this point of view, the decision in *Blott's Case* appears unfortunate. Whilst it is undoubtedly desirable that legislation, and particularly taxing legislation, should be clear, that need not necessarily involve the conclusion that by calling the same thing by another name, or going through a slightly different set of motions, or substituting inactivity for activity,[32] manifest evasion of taxation should appear to be connived at by the courts. Too great a departure from standards of "reasonableness" in such matters surely involves the danger that the legislature, faced with the virtual impossibility of foreseeing all possible shifts of words and motions, and with wholesale tax evasion involving the necessity of laying a heavier burden on those (such as employed persons) for whom such shifts are not possible, may increasingly resort to the unbridled discretion of administrative officials. It would surely be a misfortune if "income" came eventually to mean "any advantage, in whatever form offered or received, which the Commissioners in their absolute discretion shall deem to be income," or some similar formula.

This, however, may be only the parsley. The meat of *Blott's Case* was that Rule 5, the rule established in *Bouch* v. *Sproule*

[29] Their "realist" approach is unmistakable. See, *e.g.*, at p. 212: "It takes two to make a paid-up share"; at p. 215: "Money, though it comes with a clog on it, is taxable, if and because it comes. How can mere nomenclature affect rights which depend on what has to be done in order to satisfy the law?"

[30] Particularly in the oft-quoted passage at p. 408: "Provided that the company violates no statute and also keeps within its articles, it can call the subject-matter of the distribution what it likes. . . . What the company says it is, that it is as against all the world. . . . How this is effected and by what resolutions, confirmations, and instruments, does not matter, for such things are 'bare machinery.' In what the company has said or done is found the answer to the question: What has the subject-matter of the distribution now become or ceased to be, when first it reaches the taxpayer. . . . Transmuted by this alchemy, profits in hard-earned gold become extra share-certificates, and yet the shareholders, who receive them, may be greatly the gainers."

[31] In *Whitmore* v. *I.R. Comrs.* (1925) 10 T.C. 645, at all material times all the ordinary shares were held by the director to whom the mortgage stock was issued; he and his wife held together over 86 per cent. of the preference shares, the balance being owned by members of his family: he presided at all meetings at which the transactions were discussed, but Rowlatt J. at p. 664 expanded on the intention of the company and concluded that it was irrelevant that "the company adopted this transaction, being a real transaction, and one which does not make the shareholder liable to super-tax, in lieu of another transaction which would have made him liable."

[32] As in *Higgs* v. *Olivier* [1951] 2 T.L.R. 298 (since confirmed by the Court of Appeal [1952] W.N. 80) in which it was held that payments received by a film actor for refraining from acting in films for a period were capital and not income, at least for the purposes of the Income Tax Act, 1918. This decision would seem to open another broad avenue of tax evasion.

between tenant for life and remainderman, was followed and extended to the tax field. *Bouch* v. *Sproule* had held that bonus shares issued by a company were not income but capital as between tenant for life and remainderman; *Blott's Case* established that they were equally capital and not income as between remainderman and the Revenue authorities. Lord Finlay, speaking of the decision in *Bouch* v. *Sproule*, said [33] : " The question whether it was income or capital could not be affected by the purpose which led to the institution of the inquiry. If it is income, it is liable to tax upon income : if it is capital it is not so liable. The liability follows from the nature of the property, and it seems impossible to me to say that the answer to the question whether it is income or not is to depend upon the purpose with which the question is asked."

This principle, however, and the harmony established between the trust and the tax cases (even though it was in fact a harmony only of negation) lasted for only seven years, when it was abruptly shattered by the Privy Council decision in *Hill's Case*,[34] which distinguished *Bouch* v. *Sproule* and held that any dividends paid in cash or extraneous shares, even if they represented capital profits, were income in the hands of a trustee shareholder and accrued for the benefit of the tenant for life. In so far as capital profits were concerned, this decision was plainly contrary to the established practice in tax cases (Rule 4).

The decision has recently leapt into some prominence as a result of the crop of cases, starting with *Re Sechiari*, resulting from the transaction under the Transport Act, 1947, by which the British Transport Commission acquired inter alia from Thomas Tilling Ltd. that firm's former interests in passenger road transport and road haulage undertakings, in consideration of an allotment of £24,800,000 worth of British Transport guaranteed stock at £101 per cent. The company then declared a capital profits dividend of £20,806,000 " payable out of the profit realised by the company " on this sale, and £20,806,000 worth of the British Transport stock was issued to the company's members in the proportion of £5 worth for every £1 of the company's stock. In three cases [35] it was held that the Transport stock was income belonging to the tenants for life of settled shares in Thomas Tilling Ltd., although the Stock Exchange quotation per £1 stock fell from £6.4.—cum dividend to £1.8.—ex dividend. Since the stock was distributed in payment of a capital profits dividend, there seems no doubt that, under rule (4), no income tax was payable upon it.

[33] at p. 197.

[34] See note 7, *supra*. *Re Bates*, at first instance, had preceded *Hill's Case* by two years, but it is perhaps true to say that it was *Hill's Case* that shook the profession, which had previously regarded the rule in *Bouch* v. *Sproule* as applicable.

[35] *Re Sechiari* [1950] 1 All E.R. 417; *Re Kleinwort's Settlement Trusts* [1951] Ch. 860; and *Re Rudd's Will Trusts* [1952] 1 All E.R. 254.

In *Bouch* v. *Sproule*, Lord Herschell said: [36] "The tenant for life is not intended to run away with a bonus that may have been accumulating for half a century." That, under the recent decisions, is precisely what he is permitted to do.

This line of decisions has also rather curious beginnings. *Hill's Case* was based on the authority of *Re Bates*, which was a clear case of capital profit.[37] The only authority cited for *Re Bates*, however, was the 1861 decision of *Maclaren* v. *Stainton*.[38] This, surely, is a somewhat shaky foundation for such a superstructure. Moreover, in *Bouch* v. *Sproule*, considerable emphasis was placed on the intention of the company to capitalise; in recent decisions no more attention has been given to the intention of the company in the trust cases than has been paid to the intention of the settlor. Clearly the intention of the company can hardly operate at all in an enforced sale of the kind involved in the Tilling cases. Nor, it is submitted, would a compulsory statutory successor normally be regarded as "another company."

Romer J.'s decision in *Re Sechiari*, which involved £20,000 worth of Transport stock, was given without prejudice to any question whether, in the circumstances of the execution of the trust, the court had or would exercise any jurisdiction to apportion the dividend on equitable principles between tenant for life and remainderman, and in *Re Kleinwort's Settlement*, which concerned £10,000 worth of the Transport stock, Vaisey J. considered this possibility more fully, but thought that the jurisdiction would be exercised only where the trustees had been guilty of a breach of trust. Although "the disparity between the amount of the original capital of the Tilling stock and the amount of the British Transport stock is certainly very striking," he did not consider it "such as by itself to justify the court's interference." In the later case of *Re Maclaren's Settlement Trusts*, in which, in the particular circumstances, Harman J. held that the Transport stock was capital, he also considered, though *obiter*, how far the court had power to declare that what *ex facie* is income is, in truth, capital, or vice versa. He was "inclined to agree" that the court's power to apportion was confined to cases of breach of trust, and he concluded: "As a matter of convenience, the practice in the ordinary case is that no apportionments are made, with the result that capital sometimes gets what, on a more exact scrutiny, would prove to be income and vice versa. *Where this produces a glaring*

[36] at p. 394.

[37] A company owning steam trawlers distributed a capital payment from profits realised by the sale of some trawlers at sums largely exceeding the values placed on them in the company's balance sheet.

[38] A company received, from the estate of its deceased manager and shareholder, a compromise payment of £220,000 in respect of debts due from him to the company, and distributed a bonus as a result, which was held to be a windfall, payable to the tenants for life.

Re Piercy [1907] 1 Ch. 289 was a decision to the same effect, but on rather peculiar facts.

injustice, the court will cause a more exact calculation to be made, but it does not treat as income that which is capital, or as capital that which is income."

In the most recent case of *Re Rudd's Will Trusts*, involving £49,750 worth of Transport stock, an even stronger case for apportionment, on the basis of breach of trust, was put forward, but Upjohn J. again rejected it and declared the whole amount payable to the tenants for life.

If it is remarkable that the tenant for life should thus be able to run away with a "windfall" of £49,750 that may have been accumulating for half a century, it is surely astonishing that, simply because of this, he should not be liable for income tax; the sum that is so firmly income as between himself and the remainderman becomes equally firmly capital as between himself and the revenue authorities.

The position can hardly be considered satisfactory. The trust cases have moved far away from *Bouch* v. *Sproule* and, it is submitted, from the intention of the settlor; the tax cases have adopted a restrictive interpretation of taxing statutes and, whilst heavily stressing the freedom of persons and companies to evade taxation, have ignored taxing practice, which in its turn seems partly to be based on outworn theories. Both lines of authority have, since *Blott's Case*, shown a magnificent disregard of the other, and of the need for a comprehensive view of what the law considers income and what capital. The time seems more than ripe for a fresh assessment of the situation by a superior court.

O. M. Stone.[39]

[39] Miss Olive Stone, LL.B., B.SC.(econ.), is an Assistant Lecturer in Law at the London School of Economics and Political Science.

WRONGS AND REMEDIES IN ADMINISTRATIVE LAW

I

No aspect of English law lends itself less readily to traditional methods of exposition than the law relating to judicial review of administrative acts and decisions. Most of the reasons for this intractability are well known. Administrative law is not a homogeneous body of jurisprudence, but is rather an agglomeration of diverse and complex branches of law—liquor licensing, transport, social insurance, education, public health, housing, town and country planning, to mention only a few—and judicial review in each individual branch of administrative law has tended to develop in a distinctive manner. Thus, the standards of conduct that the courts have imposed on a Minister who is deciding whether to confirm a compulsory purchase order differ from the standards imposed on licensing justices. The difficulty of general exposition is increased by the variety of verbal formulas to be found in statutes conferring powers and duties upon administrative bodies. And in the process of interpretation a statutory formula literally applied by one judge may be read in an opposite sense by another judge, using another canon of interpretation, in a different context. Moreover, the terminology employed by the courts is often indeterminate. "Executive," "administrative," "ministerial," "legislative," "quasi-judicial," may be used to describe the same act or decision. The scope of review often depends upon whether a function is characterised as judicial or administrative; yet no consistently applied test for distinguishing between the two categories can be extracted from the English cases or from the multitudinous decisions in other common law jurisdictions.[1] To one who is attempting to expound the law of judicial review this may seem unfortunate. On the other hand, had the courts defined the terms uniformly for all purposes the effect upon the state of the law might have been still more unfortunate.

Faced with these formidable but intriguing problems, writers on administrative law have adopted two main methods of approach. The one has been to state certain broad general propositions and to support them with the citation of a small number of leading cases. This makes for an attractive simplicity, but is apt to leave an impression of over-simplification among those who have wrestled

[1] For valuable analyses of the confused state of the law in relation to this problem in Australia, see the articles of Geoffrey Sawer in (1948) 1 U. of W. Australia Annual Law Review 29; Zelman Cowen in (1948) 26 Can.B.R. 829; and F. R. Beasley in (1949) 27 Can.B.R. 686.

with the problems. When a distinguished private lawyer recently expressed the view that there was "too much flabbiness and too little toughness about many aspects of our public law,"[2] he may have had in mind the reluctance of public lawyers to come to grips with problems which are, unhappily, only too likely to tie them into knots. The other favourite method of approach has been to analyse not so much what the judges say as what they do, and in particular to expose the inadequacies of the conceptualistic approach to be found in the judgments. This approach to the problems of judicial review is, it is thought, valuable and necessary; but unless critical analysis is combined with constructive proposals and thorough exposition of the present law, such writings are unlikely to have much direct influence on legal development.

There is, however, one vital aspect of judicial review which can be examined historically and critically and which at the same time is suited to detailed analytical exposition. That aspect is the law relating to judicial remedies, of which the most important are certiorari, prohibition and mandamus. It is possible to trace with assurance their origins and development. The rules governing their availability can be extracted from the cases, or, where these are unsafe guides, from the basic principles that underlie the general practice of the courts. To prophesy the view that a court will take of the powers or duties of an administrative authority in a particular case must inevitably remain a hazardous undertaking; but there is no reason why it should be equally hard to say what is likely to be the appropriate method of challenging the conduct of that authority. Nevertheless doubts about the exact scope of the several remedies remain a source of uncertainty. Suits are lost because the wrong remedies have been chosen. And, what is in the long view a more serious matter, suits have been lost or won that might have been otherwise decided had the courts analysed the principles on which they were entitled to award the remedies sought.

Applications for certiorari, prohibition and mandamus must be made to a Divisional Court of the Queen's Bench Division. They concern a wide range of administrative bodies and also inferior courts of law. Cases cited to the Divisional Court tend to be confined to those directly related to the provisions of the statute before the court. Leading cases on the scope of the *remedy* that is being sought are too often overlooked because they were decided in a different legislative context. Judgment in the Divisional Court is seldom reserved. The result has been that contradictory decisions upon the scope of judicial remedies have been reached although the court has not appeared to be aware of any inconsistency. One object of the present article is to draw attention to some of the anomalies that impede rational exposition of the law, and, where possible, to suggest how they may best be removed.

[2] Sir David Hughes Parry in (1950) 28 Can.B.R. at 193.

II

Development of Certiorari

Perhaps the most important judicial remedies in administrative law are the two orders replacing the old prerogative writs of prohibition and certiorari. Today there appears to be no significant difference between the scope of the two orders, except that prohibition will not issue if there is nothing left to prohibit[3]; the discussion that follows is therefore limited to certiorari, apart from incidental references to prohibition.

From the last years of Henry III's reign until the end of the sixteenth century writs of certiorari issued for a great variety of purposes.[4] From 1600 onward we find reports of cases in which certiorari issued for a purpose relevant to the present inquiry: the King's Bench awarded certiorari to quash convictions made by justices out of sessions. Gradually it became settled that to move the King's Bench for a certiorari was the appropriate method of attacking orders and convictions by inferior courts for irregularity or want of jurisdiction, and by 1700, Holt C.J. was able to generalise in the broadest terms: "It is a consequence of all jurisdictions to have their proceedings returned here by certiorari. . . . Where any court is erected by statute, a certiorari lies to it."[5] In the *Cardiff Bridge Case*[6] (1700) it was held that the writ would issue to county justices in respect of their duties of fixing rates for the repair of bridges. For the whole of the eighteenth century and the early part of the nineteenth the business of local government in the counties was carried on under judicial forms by justices of the peace; and both as local administrators and as members of inferior courts of law they were subject to the supervisory control of the King's Bench, exercised primarily by means of the prerogative writs. Maitland has said that whatever the justices had to do was "the exercise of a jurisdiction."[7] There was as yet no question of distinguishing between "judicial" and "administrative" functions and of excluding from the province of certiorari and prohibition the latter class of functions. However, purely ministerial acts,[8] that is to say, formal administrative acts in the performance of which the justices were given no statutory

[3] It is sometimes said that prohibition (*a*) may lie to courts that are not "inferior" and (*b*) may lie to tribunals that have misconstrued statutes though without thereby exceeding their jurisdiction. Neither of these propositions is supported by sufficient authority.

[4] de Smith, "The Prerogative Writs" (1951) 11 Camb.L.J. 40 at 45–47.

[5] *Groenvelt* v. *Burwell*, 1 Ld.Raym. 454 at 459.

[6] *R.* v. *Inhabitants —— in Glamorganshire*, 1 Ld.Raym. 580.

[7] "The Shallows and Silences of Real Life," *Collected Papers*, i, 478.

[8] Classification of functions as judicial, *administrative* and ministerial is a comparatively recent development. Until well into the nineteenth century all functions of courts and tribunals that were not purely ministerial were called judicial. When a distinction came to be drawn between judicial and administrative functions, the latter were often described, most confusingly, as ministerial.

discretion, lay beyond the reach of the two writs;[9] failure to perform a ministerial duty was a ground for the issue of a mandamus.

In the early nineteenth century it could be said that certiorari issued only to inferior *courts*, and that it was immaterial whether the members of the court were applying the criminal law, determining civil claims, or exercising discretionary governmental functions; all acts that were not purely ministerial were open to review in proceedings for certiorari. After 1832 a new phase opened in the history of certiorari. Elected local government authorities and *ad hoc* bodies with extensive powers over persons and property were set up to administer the expanding functions of government. In some cases duties formerly discharged by the justices were transferred to them. Parliament often provided a statutory appeal by way of certiorari from acts and decisions of these bodies.[10] It was natural that the courts should hold that common law certiorari would issue to the new bodies where Parliament had made no express provision for a method of challenge. Similarly, it was decided (though not without some hesitation) that acts of central government departments presided over by responsible Ministers were amenable to certiorari and prohibition. No longer was the availability of the writs limited to courts *stricto sensu*, or even to bodies closely resembling courts. Accordingly, the question whether the writs would issue in a particular case came to be determined by reference to the character of the act or decision that was impugned rather than by reference to the character of the body that had rendered it. That is the position that obtains today. Since, for various reasons, the courts have not been prepared to review every exercise of the functions of administrative authorities that effect private interests, they have sometimes refused to issue the writs on the ground that a function is not judicial but administrative.[11] Again, some functions have been held not to be open to review because they are legislative in character, or stages in legislative procedure.[12] But in general the courts have not been astute to find reasons why the writs should not issue

[9] In the exercise of their discretion the courts also refused to issue the writs to bring up certain "judicial" acts—*e.g.*, orders of the Commissioners of Sewers: *R.* v. *Commrs. of Sewers in Yorkshire*, 1 Str. 609—the removal of which might cause great inconvenience or hardship.

[10] *e.g.*, Poor Law Amendment Act, 1834; Municipal Corporations (General) Act, 1837, s. 44; Tithe Act, 1837, s. 3.

[11] See *Chabot* v. *Lord Morpeth* (1850) 15 Q.B. 446; *Re Grosvenor West-End Railway Terminus Hotel Co.* (1897) 76 L.T. 337; *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66; *R.* v. *Barry, ex p. Howe* [1950] 1 D.L.R. 284. At one time licensing functions were held not to be judicial: *R.* v. *Salford Overseers* (1852) 18 Q.B. 687; *R.* v. *Company of Watermen, etc.* [1897] 1 Q.B. 659; *R.* v. *Sharman* [1898] 1 Q.B. 578, but this view was later abandoned: *R.* v. *Woodhouse* [1906] 2 K.B. 501; *R.* v. *L.C.C.* [1931] 2 K.B. 215.

[12] *R.* v. *Hastings Local Board* (1865) 6 B. & S. 401; *Re Local Government Board* (1885) L.R.Ir. 150; see also *R.* v. *Legislative Committee of the Church Assembly* [1928] 1 K.B. 415.

when justice appears to require that the applicant should have a remedy,[13] and functions have been treated as judicial although, in a different context, they might have been characterised as administrative because of the wide statutory discretion conferred upon the public authority.[14]

III

Scope of Certiorari

The courts have seldom refused to issue certiorari solely on the ground that an act or decision impugned is not judicial in character. But this is not to say that certiorari is an appropriate remedy whenever an administrative body errs in law or fact, or misapplies its discretionary powers. It will be shown that the scope of certiorari in relation to such bodies is not altogether clear.

Certiorari will go to inferior courts of law on any of the following grounds: (a) want of jurisdiction, which may arise through improper constitution of the court, or absence of essential preliminaries to the hearing, or express or implied exclusion of the subject-matter from its authorised province of adjudication; (b) excess of jurisdiction, through non-observance of essential procedural requirements during the hearing, or the delivery of a sentence or the making of an order unauthorised by law, or the giving of a wrong decision on a fundamental point that is "collateral to the merits" of the case; (c) abuse of jurisdiction, in so far as this refers to breach of the common law rules of natural justice; (d) ouster of jurisdiction, as where certain defences are raised that deprive the court of competence to continue with the hearing; (e) irregularity or error of law on the face of the record of the proceedings; (f) fraud or collusion in procuring the conviction or order.[14a] In proper cases, the order will issue on the same grounds to administrative bodies whose functions have been characterised as judicial. The courts have so held in recent cases where decisions of administrative tribunals have been attacked by certiorari.[15]

[13] *R.* v. *Local Government Board* (1882) 10 Q.B.D. 309 at 321; *R.* v. *Woodhouse* [1906] 2 K.B. 501 at 535; *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171 at 206; *R.* v. *Minister of Health, ex p. Dore* [1927] 1 K.B. 765; *R.* v. *Postmaster-General, ex p. Carmichael* [1928] 1 K.B. 291; *R.* v. *L.C.C.* [1931] 2 K.B. 215; *R.* v. *Hendon R.D.C., ex p. Chorley* [1933] 2 K.B. 696; *R.* v. *Boycott, ex p. Keasley* [1939] 1 K.B. 651. See also *R.* v. *Minister of Town and Country Planning* [1951] 1 K.B. 1, where certiorari was refused on the merits of the case but its appropriateness as a remedy not questioned. And see now *R.* v. *Manchester Legal Aid Committee, ex p. R. A. Brand & Co.*, [1952] 1 All E.R. 480.

[14] There is no English case in the present century in which the court has been satisfied that a body *has in fact exceeded* its jurisdiction and has yet refused to issue certiorari on the ground that the act in question is not judicial.

[14a] This list may not be wholly exhaustive: see *R.* v. *West Kent Quarter Sessions Appeal Committee, ex p. Files* [1951] 2 All E.R. 728 at 732.

[15] *R.* v. *Ludlow, ex p. Barnsley Corporation* [1947] K.B. 634; *R.* v. *Paddington & St. Marylebone Rent Tribunal, ex p. Kendal Hotels, Ltd.* [1947] 1 All E.R.

Certiorari will *not* go to inferior courts of law for errors of law not apparent on the record and not going to jurisdiction,[16] or for wrongful admission or rejection of evidence,[17] or for a decision contrary to the evidence or even for one unsupported by any evidence at all.[18] Here again, the courts have accepted, in cases where the question has been broached, that these rules also govern the issue of certiorari to bodies that are not courts.[19]

Superficially, then, the law appears simple and straightforward. Rules of common law enunciated for the purpose of judicial control over inferior courts have been applied for the purpose of judicial control over administrative bodies. But the design is more complex than it seems. Some administrative bodies that have been held to act "judicially" for the purpose of certiorari bear little resemblance to ordinary courts. They do not keep formal records; more than ordinary courts they exercise functions that are avowedly discretionary; even the procedure they follow in reaching their decisions may have little in common with that followed in the courts. As administrative bodies, they are said to be governed by the principles of the *ultra vires* doctrine. But in certiorari proceedings the main question that is commonly asked is whether they have exceeded (or acted without) jurisdiction. It seems to be universally assumed that to inquire whether a body has exceeded (or acted without) jurisdiction is necessarily to inquire whether it has acted *ultra vires*, because the difference between the two inquiries is purely verbal. That the two methods of inquiry usually produce the same answer can be conceded. Nevertheless, it is possible that in some cases they may produce different answers, because certain forms of abuse of powers, which may cause an administrative body to be regarded as having acted *ultra vires*, do not "go to jurisdiction." This curious problem does not often arise, and when it does arise the reviewing court can evade it by asking simply whether the body has acted in excess of its "legal

448; *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1951] 1 K.B. 711; [1952] 1 T.L.R. 161 (see also *John East Iron Works, Ltd.* v. *Labour Relations Board of Saskatchewan* [1949] 3 D.L.R. 51).

[16] *R.* v. *Weston-super-Mare, ex p. Barkers (Contractors), Ltd.* [1944] 1 All E.R. 747 is the best recent illustration.

[17] But see *R.* v. *West Riding of Yorkshire JJ., ex p. Broadbent* [1910] 2 K.B. 192; *cf.* also *R.* v. *Walton, ex p. Dutton* (1911) 75 J.P. 558.

[18] *R.* v. *Nat. Bell Liquors, Ltd.* [1922] 2 A.C. 128; *R.* v. *Cheshire JJ.* (1838) 8 Ad. & E. 398; *R.* v. *Bucks JJ.* (1843) 3 Q.B. 800; *Ex p. Hopwood* (1850) 15 Q.B. 121; *R.* v. *Shropshire JJ.* (1866) 14 L.T. 598; *R.* v. *Galway JJ.* [1906] 2 Ir.R. 446; *R.* v. *Mahoney* [1910] 2 Ir.R. 695; *Lexden and Munster Union Guardians* v. *Southgate* (1854) 10 Ex. 201 (prohibition).

[19] See *R.* v. *Minister of Health* [1939] 1 K.B. 232 and the *Barnsley Corporation* and *Kendal Hotels Cases* cited *supra*, note 15, in which a passage in *Halsbury*, 2nd ed., ix, 888, setting out these restrictive rules was approved and applied. But in *R.* v. *Salford Assessment Committee, ex p. Charles Ogden & Co.* (1948) 41 R. & I.T. 200 the Divisional Court issued certiorari to quash a decision of the committee on the ground that it was supported only by assertions based on hearsay. This is plainly inconsistent with the many decisions that show that want of evidence does not go to the jurisdiction of a tribunal. No relevant cases on this point were cited in the judgments.

authority."[20] It is, however, a problem that requires further examination.

IV

Review in Terms of Jurisdictional Defects

The characteristic attribute of a judicial act or decision is that it binds, whether right or wrong, reasonable or unreasonable; that is to say, it cannot be impeached in collateral proceedings[21] or by means of the orders replacing the prerogative writs, although, of course, it may be set aside on appeal. This proposition applies both to ordinary courts and to administrative bodies that are held to act in a judicial capacity,[22] but it is qualified by the rule that judicial error loses its impregnability if it relates to a jurisdictional point. A body that is acting in a judicial capacity has no power to err if the error causes it to assume a jurisdiction that was not entrusted to it.

As was said by Farwell L.J. in one case,[23] "it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure."[24] All bodies to which certiorari will issue are "tribunals" within the ambit of this principle. A distinction has been drawn between a decision on "the merits" and a decision on a "preliminary" or "collateral" matter,[25] *i.e.*, one that demarcates the limits of jurisdiction. Error in respect of "the merits" is unimpeachable; but it is otherwise with error on a preliminary or collateral matter, for a "wrong" decision (*i.e.*, one that is wrong in the opinion of the reviewing court[26]) on such a matter constitutes excess (or want) of jurisdiction. To distinguish between collateral and other matters may be logically impossible; no test has been consistently applied, and the decisions in relation to inferior courts *stricto sensu* reveal startling contradictions.[27] In applying the concept of limited jurisdiction to administrative bodies that have been held to act judicially for the purpose of amenability

[20] *cf. R.* v. *Electricity Commissioners* [1924] 1 K.B. 171 at 205.

[21] Except in certain special cases—*e.g.*, where a judgment has been procured by fraud; see *Halsbury*, 2nd ed., xix, 260 *et seq.*

[22] *Brittain* v. *Kinnaird* (1819) 1 Brod. & B. 432; *R.* v. *Bolton* (1841) 1 Q.B. 66; *Colonial Bank of Australasia* v. *Willan* (1874) L.R. 5 P.C. 417; *R.* (*Wexford C.C.*) v. *Local Government Board* [1902] 2 Ir.R. 349 at 373; *R.* (*Waterford Corporation*) v. *Local Government Board* [1922] 2 Ir.R. 76 at 93.

[23] *R.* v. *Shoreditch Assessment Committee* [1910] 2 K.B. 859 at 880.

[24] But Parliament may, by apt words, make a tribunal sole judge of the limits of its jurisdiction: see Lord Esher M.R.'s much-quoted words in *R.* v. *Special Commissioners of Income Tax* (1881) 21 Q.B.D. 313 at 319.

[25] *Bunbury* v. *Fuller* (1853) 9 Ex. 111 at 140.

[26] But where the disputed decision on the jurisdictional issue turns on a point of fact only, the courts are slow to interfere with the decision of the tribunal: see *R.* v. *Fulham, etc., Rent Tribunal, ex p. Zerek* [1951] 2 K.B. 1 at 11–14 and authorities there cited.

[27] See D. M. Gordon's brilliant analysis in "The Relation of Facts to Jurisdiction" (1929) 47 L.Q.R. 459, and especially the cases he cites at 479–482.

to certiorari, the courts have shown less vacillation. In the great majority of cases where such a body has been alleged to have exceeded its powers and where certiorari has been sought, the courts have held (or, more often, tacitly assumed) that the allegation of error concerned a collateral, jurisdictional issue [28] and was therefore open to examination.

The elasticity of the concept may be illustrated by cases in the law of liquor licensing. Licensing justices, although regarded as acting judicially in that they are subject to certiorari, are to be regarded as an administrative body rather than a court.[29] Under section 57 of the Licensing (Consolidation) Act, 1910, they are empowered to grant exemption from normal closing hours on "special occasions." The courts have assumed that they are entitled to review in certiorari proceedings a decision as to what are special occasions, and have held that the term does not include weekly market days [30] or the whole period of summer time.[31] By treating the question as if it were "collateral to the merits," the courts have reached the same result as if the question had come before the courts on appeal by way of case stated.

Another group of cases carries the scope of judicial review still further. Section 1 (1) of the Licensing Act, 1921, gives the justices power to alter the permitted hours of opening on weekdays if it is shown to their satisfaction that the "special requirements" of the district render it desirable. The courts have taken the view that the question whether special requirements of the district render this desirable is primarily one for the justices, but that if there is no evidence that special requirements exist the justices will exceed their jurisdiction and certiorari will go to them.[32] This view may seem to involve a partial abrogation of judicial review; but that would be a superficial interpretation, for (i) it is impossible to see how a decision that special requirements existed is in any way "collateral to the merits"; rather is it the heart of the issue that the justices are required to decide,[33] and (ii) even assuming that the

[28] See, however, *R.* v. *St. Olave's Board of Works* (1857) 8 E. & B. 533; *R.* v. *Woodhouse* [1906] 2 K.B. 506 at 515–516; *R.* v. *Cheshire JJ., ex p. Heaver* (1913) 108 L.T. 374; *R.* v. *Minister of Health* [1939] 1 K.B. 232; *R.* v. *Minister of Health* [1942] 1 All E.R. 81, 551; *Tithe Redemption Commrs.* v. *Wynne* [1943] K.B. 752 (discussed by D. M. Gordon in an article (1944) 60 L.Q.R. 250); *R.* (*Waterford Corporation*) v. *Local Government Board* [1922] 2 Ir.R. 76.

[29] *Boulter* v. *Kent JJ.* [1897] A.C. 556; *Attwood* v. *Chapman* [1914] 3 K.B. 275.

[30] *R.* v. *Butt, ex p. Brooke* (1922) 38 T.L.R. 537.

[31] *R.* v. *Sussex JJ., ex p. Bubb* [1933] 2 K.B. 707. See also *R.* v. *Lancs JJ., ex p. Commrs. of Customs and Excise* (1934) 151 L.T. 376; *R.* v. *Inglis, ex p. Cole-Hamilton* (1921) 90 L.J.K.B. 770; and, in a slightly different context, *R.* v. *Johnson* [1905] 2 K.B. 59.

[32] *R.* v. *Wisbech Licensing JJ., ex p. Payne* [1937] 2 K.B. 706; *R.* v. *Bradford Licensing JJ., ex p. Illingworth* [1938] 4 All E.R. 48 (affirmed [1939] 3 All E.R. 106).

[33] *cf. R.* v. *Lincolnshire JJ., ex p. Brett* [1926] 2 K.B. 192 at 202–203. And see notes 18 and 19, *supra*, for the difference between want of jurisdiction and want of evidence to support a decision.

question is a collateral one, Parliament appears to have made the justices sole judges of the existence of such requirements.[34]

* * * * *

It might perhaps have been thought that the errors of administrative bodies would often have been beyond challenge in certiorari proceedings, because for the purpose of such proceedings they must be deemed to have acted in a judicial capacity and judicial error is in certain circumstances unimpeachable. But in practice the scope of review exercised by the courts has been wide, in consequence of a liberal application of the concept of limited jurisdiction. In none of the cases that have been mentioned was the scope of review in any way affected by the fact that the matter came before the courts in certiorari proceedings. If the action of the bodies concerned had been impugned in other proceedings, and if the courts, instead of treating the bodies as "judicial" bodies exercising a "jurisdiction," had treated them as "administrative" and had inquired whether they were acting *ultra vires*, it is safe to say that in every case[35] the decision of the court would have been the same. Review in terms of jurisdiction and review in terms of *vires* would lead to the same conclusion. If, then, the two methods of review are liable to lead to different conclusions, the problem does not arise in the type of case that has been considered in this section.

V

Certiorari, Mandamus and Abuse of Discretionary Powers

The problems considered up to this point have centred mainly around judicial review of orders that have been based on administrative findings of law or fact. To differentiate rigidly between findings of law or fact and "purely discretionary" functions is often unrealistic. Where the making of a valid order is dependent on a finding that has to be related to a vague statutory standard (*e.g.*, that a house is "unfit for human habitation," that "special requirements" exist in a district, that there are "reasonable grounds" for believing a person to be unfit to hold a licence), the measure of discretion involved in the administrative finding may be very large. But it is usually possible to draw an acceptable distinction between matters of law and fact, on the one hand, and matters of discretion, on the other; and in laying down general principles of judicial review the courts have, on the whole, acted on the assumption that the quantitative distinction between the two classes of matters can be analysed in qualitative terms.

Discretionary administrative powers are classified as qualified and absolute. Qualified administrative powers must be exercised with a "judicial discretion," that is, exercised not arbitrarily or

[34] *cf. R.* v. *Special Commissioners of Income Tax*, note 24, *supra*.
[35] Including those cited at note 28, *supra*.

capriciously but in accordance with certain standards of propriety.[36] This means in practice that the authority invested with the power must genuinely put its mind to the matter, must act in good faith, must have regard to relevant considerations and disregard the irrelevant, must not use its power for unauthorised purposes, and must not act with gross unreasonableness.[37] These several rules, which "overlap to a very great extent,"[38] are commonly regarded as aspects of the *ultra vires* doctrine.[39] An administrative body which disobeys the rules acts *ultra vires*. Absolute discretionary powers are usually found not to be literally "absolute," for they must not be used for unauthorised purposes; but they are distinguishable from qualified discretions in that the considerations to which the authority may have regard are almost unlimited and in that the question of unreasonableness is wholly merged with that of good faith.[40]

How may abuses of discretionary powers be challenged in the courts? Parliament sometimes gives a right of appeal to the ordinary courts from a decision of an administrative body. Normally the right of appeal is expressly limited to questions of law, but the courts have in some cases construed statutes as entitling them, in the exercise of their appellate jurisdiction, to review even the reasonableness or expediency of the manner in which an administrative body has exercised its discretion.[41] Again, questions of abuse of discretion may be raised where Parliament has given parties aggrieved by housing and town planning orders the right to make an application to the courts to have them set aside on the ground that they are not within the powers conferred by the enabling Act.[42] They may also be raised in an action for a declaration,[43] or in civil actions for damages or an injunction, or in criminal proceedings. But perhaps the most frequently used method of raising such questions is by proceedings on the Crown side for certiorari and mandamus. Yet the extent to which certiorari is appropriate for this purpose is open to doubt, and

[36] *Rooke's Case*, 5 Co.Rep. 99; *Keighley's Case*, 10 Co.Rep. 139; *Sharp v. Wakefield* [1891] A.C. 173; Robson, *Justice and Administrative Law*, 3rd ed., 399 *et seq.*

[37] The principle that authorities whose functions are characterised as "judicial" must also comply with the rules of natural justice is not discussed in this article. See articles by de Smith in (1948) 11 M.L.R. 306 and H. W. R. Wade in (1949) 10 Camb.L.J. 216 on this problem.

[38] *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223 at 229.

[39] *e.g.*, in *Short* v. *Poole Corporation* [1926] Ch. 66 at 90.

[40] A discretionary power will be literally absolute if the enabling Act expressly and unambiguously prohibits judicial review of its exercise; see, *e.g.*, British Nationality Act, 1948, s. 26.

[41] See, in different contexts, *Croydon Corporation* v. *Thomas* [1947] K.B. 386; *Middlesex C.C.* v. *Miller* [1948] 1 K.B. 438; *Stepney B.C.* v. *Joffe* [1949] 1 K.B. 599; *Parkstone Primrose Laundry* v. *Poole Corporation* (1950) 114 J.P. 354. *Cf.* also *Pilling* v. *Abergele U.D.C.* [1950] 1 K.B. 636.

[42] As in *Earl Fitzwilliam's Wentworth Estates Co.* v. *Minister of Town and Country Planning* [1951] 2 K.B. 284.

[43] As in the *Wednesbury Case* [1948] 1 K.B. 223.

the appropriateness of mandamus has been established only by virtue of some strange decisions by the courts.

(a) *Certiorari*

Certiorari will issue to quash an order made by an administrative body only if the functions of that body are characterised as being at least partly judicial. Those who insist that a clear-cut distinction exists between judicial and administrative functions have argued that certiorari is appropriate to review judicial error only.[44] They regard administrative acts (by which they mean exercises of discretionary powers that are not governed by statutorily prescribed standards) as being inherently arbitrary and therefore outside the province of judicial review. This view, however, has not commended itself to the courts.[45] Certiorari has issued in respect of certain forms of abuse of "administrative" discretions by bodies whose general functions have been characterised as judicial. The question to be discussed is, when is certiorari the appropriate remedy in such cases? This problem has seldom been squarely faced, and never adequately discussed, in the reported cases. The propositions set out below are therefore no more than tentative solutions to the difficulties that arise.

(1) Where the administrative body uses its powers ostensibly for the purpose for which they were granted but in reality for a wholly unauthorised purpose, certiorari may properly issue to quash its act or decision.[46] Whether or not the body intended to misapply its powers is immaterial. It is also probably immaterial whether Parliament has defined the permitted purposes expressly or by implication.[47]

So to act is to act *ultra vires*, or, to use the language appropriate to certiorari cases, in excess of jurisdiction. A possible analogy is the case of a tribunal which is under a *duty* to decide a point of dispute submitted to it, but which fails to address itself to this point and exceeds its jurisdiction by giving a ruling on a wholly extraneous point.[48]

(2) Where the administrative body makes an order which shows *on its face* that irrelevant considerations have been taken into account or that relevant considerations have been disregarded in the exercise of its discretion, certiorari may properly issue to quash the order.

44 Notably D. M. Gordon in "'Administrative' Tribunals and the Courts" (1933) 49 L.Q.R. 94.

45 See, *e.g.*, *R.* v. *L.C.C.* [1931] 2 K.B. 215; and *cf.* Gordon's criticisms in (1932) 10 Can.B.R. 198.

46 *R. (Wexford C.C.)* v. *Local Government Board* [1902] 2 Ir.R. 349; *R.* v. *Minister of Health, ex p. Davis* [1929] 1 K.B. 619 (prohibition).

47 See the *Bell Rent Tribunal Case* ("Block Reference Case") [1949] 1 K.B. 666, though the decision is open to criticism in certain respects. *Cf.* also *R.* v. *Brighton Corporation, ex p. Shoosmith* (1907) 96 L.T. 762; this, however, was a case of statutory certiorari, not common law certiorari.

48 *Board of Education* v. *Rice* [1911] A.C. 179.

This situation may arise where a planning authority refuses a property owner permission to develop his land, giving reasons which it is expressly or impliedly precluded from taking into account [49]; or where a licensing authority grants a licence subject to conditions which it has no power to impose.[50] Such orders may properly be dealt with by the courts, in accordance with the general principle that an order that exhibits an error of law on its face can be quashed by certiorari.[51]

(3) Where the administrative body has, in exercising its discretion, taken irrelevant matters into account or disregarded relevant matters or come to a grossly unreasonable decision, *but has not made an order that exhibits these defects on its face*, it is very doubtful whether certiorari will issue to it, unless (*semble*) the abuse of powers is tantamount to an attempt to use them to effect an entirely different purpose from that for which they were conferred.[52]

This proposition is supported by authorities of respectable antiquity. Thus, it was held in the eighteenth century that certiorari would lie to quash rates fixed by justices if they were inequitably assessed, but only if the faulty basis of assessment was apparent on the face of the order.[53] More recently the Divisional Court has held that the same general principle governs the review of decisions by administrative tribunals. In the *Kendal Hotels Case* [54] landlords applied for certiorari to quash a decision of a rent tribunal on the grounds that the tribunal had fixed the rent without having taken relevant considerations into account and at an arbitrarily low figure. The Divisional Court dismissed the application, holding that any errors committed by the tribunal did not go to its jurisdiction. There was no question of the order being bad on its face. The Lord Chief Justice, delivering the leading judgment, compared the application with one for certiorari to quash the order of a court for latent error of substantive law not going to jurisdiction, or for error as to the admissibility of evidence or the weight of evidence.[55]

In short, to exercise a discretion irrelevantly or unreasonably is not to "exceed jurisdiction." If the misapplication of powers

[49] *R.* v. *East Kesteven R.D.C.* [1947] 1 All E.R. 310, where the court held that the discretion had been properly exercised but apparently assumed that certiorari could properly have issued if it had been abused.

[50] *R.* v. *L.C.C.* [1931] 2 K.B. 215; *R.* v. *Minister of Transport, ex p. Upminster Services, Ltd.* [1934] 1 K.B. 277. In both cases orders were quashed although the licensing authority had power to make such order as it thought fit.

[51] *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 T.L.R. 161.

[52] As in proposition (1), *supra*.

[53] *R.* v. *Mast* (1795) 6 T.R. 154 at 156; *R.* v. *Salop JJ.*, Sess.Cas. 73. *Cf.* note, p. 218, *infra*.

[54] *R.* v. *Paddington & St. Marylebone Rent Tribunal, ex p. Kendal Hotels, Ltd.* [1947] 1 All E.R. 448. See also *R.* v. *Brighton & Area Rent Tribunal, ex p. Marine Parade Estates* (1936), *Ltd.* [1950] 2 K.B. 410.

[55] Quoting the well-known passage in *Halsbury*, 2nd ed., ix, 888; see also note 19, *supra*.

can be seen merely by looking at the order made by the administrative body, certiorari will issue, not because there has been excess of jurisdiction but because there is, in effect, error of law on the face of the "record." Just as, in the case of courts *stricto sensu*, affidavit evidence is not admitted to show latent error of law or fact unless the error goes to the jurisdiction of the court, so in the case of administrative bodies such evidence should not be admitted to show that the body has exercised its discretion irrelevantly or unreasonably, because such errors are not jurisdictional errors. To classify them as jurisdictional would be to stretch the elastic concept of jurisdiction beyond breaking-point.

It is at this point that difficulties arise. One of the principles of the *ultra vires* doctrine is that administrative bodies which exercise discretionary powers arbitrarily or on irrelevant grounds act *ultra vires*. But, as has been indicated, such a misapplication of powers does not ordinarily affect *jurisdiction*; and in certiorari proceedings it is usual to review the conduct of these bodies in terms of jurisdiction. A case may therefore occur where in certiorari proceedings the courts will hold an order to be unimpeachable because it is within the jurisdiction of the body making it, although on the same facts in another form of proceeding they might hold that the body has, by abusing its powers, acted *ultra vires*. It is not suggested that the *Kendal Hotels Case* (*supra*) is an example of this type of case. Rent tribunals have been left free to evolve their own standards for the purpose of determining reasonable rents. "Parliament has chosen to make them the absolute masters of the situation and to leave the decision of these cases to them without appeal."[56] Accordingly, the courts regard them as having legal power to take a very wide range of considerations into account and even, in certain circumstances, to err in the construction of the relevant legislation. But problems may well arise where, *e.g.*, another type of tribunal, the scope of whose discretion is more narrowly defined, is shown, in certiorari proceedings, to have taken improper factors into account.

Those who have formed the opinion that the problem expounded above is a figment of the writer's imagination may draw sustenance from other cases which indicate that the principles laid down in the *Kendal Hotels Case* as to the limitations of certiorari are not settled law. Thus certiorari has issued to quash a decision by a licensing authority not to renew an on-licence, its refusal having been determined by the irrelevant criteria of how much the licensee was prepared to pay to a compensation fund and how many other licences he was prepared to surrender.[57] Affidavit evidence was

[56] *Kendal Hotels Case* [1947] 1 All E.R. 448 at 450.

[57] *R.* v. *Shann* [1910] 2 K.B. 418. See also *R.* v. *Minister of Transport, ex p. H.C. Motor Works, Ltd.* [1927] 2 K.B. 401, where, however, certiorari was refused on the merits; and also dicta in *R.* v. *Board of Education* [1910] 2 K.B. 165 at 175 *et seq.*

admitted to show the grounds of refusal. Again, affidavits have been admited, and prohibition and certiorari issued, in cases where authorities entrusted with substantially discretionary powers have been held to have "exceeded their jurisdiction" by applying "wrong tests" in exercising them.[58] A decision of the Divisional Court in 1948[59] calls for some comment, coming as it did so soon after the *Kendal Hotels Case*. It concerned the functions of county court registrars under the Workmen's Compensation Act, 1925. Workmen who had contracted pneumoconiosis in the course of their employment agreed with the National Coal Board to accept lump sums of £400 in settlement of their claims for compensation. Under the Act the registrar, before recording the memoranda of agreement, had to satisfy himself that the sums agreed upon were adequate; but here, so it was shown by affidavits, he recorded them without considering the adequacy of the £400 in the individual cases, on the grounds that the parties were satisfied and that this was the largest sum the Board would pay to claimants. The court held that the registrar had erred in treating these factors as conclusive, and that since he had failed to take into account the question of adequacy certiorari would go to quash the recording of the memoranda. Yet if it was the right remedy,[59a] then not only were the principles laid down by the Divisional Court in the *Kendal Hotels Case* a few months earlier too narrow, but the old decisions on the scope of certiorari have imperceptibly faded away and the union between certiorari and the concept of jurisdiction has ended in an unpublicised divorce.[60]

* * * * *

If, as has been suggested, certiorari may be of limited efficacy for the purpose of attacking the exercise of administrative discretions, the question arises, what other remedies, other than statutory remedies, are suitable for this purpose? One is the action for a declaration. The High Court of Australia has ruled[61] that the validity of a decision by an administrative tribunal cannot be questioned by this method where certiorari or prohibition would be appropriate. But even if this case is followed in England, this method will remain available to question a decision on the grounds of irrelevancy or arbitrariness, for, as we have seen, these defects do not go to jurisdiction and unless patent on the record probably

[58] *Estates & Trust Agencies* (1927), *Ltd.* v. *Singapore Improvement Trust* [1937] A.C. 898; *R.* v. *Connell, ex p. Hetton Bellbird Collieries, Ltd.* (1944) 69 C.L.R. 407.

[59] *R.* v. *Registrar of Pontypridd County Court* [1948] 1 All E.R. 218.

[59a] In addition to certiorari to quash, mandamus issued to order the registrar to hear the matter again. On the authorities, mandamus may be regarded as an appropriate remedy; but the judgment of the court was concerned with the question whether certiorari ought to issue to quash what had already been done.

[60] *cf.* the strange decision of the Divisional Court in the *Salford Assessment Committee Case* (1948), criticised note 19, *supra*.

[61] *Toowoomba Foundry Pty., Ltd.* v. *Commonwealth* (1945) 71 C.L.R. 545, distinguishing *Cooper* v. *Wilson* [1937] 2 K.B. 361 on this point.

lie beyond the reach of certiorari. In fact, however, the action for a declaration has been used surprisingly little for this purpose.[62] No doubt this is because it has not been regarded as having a wider scope than certiorari. Also, a declaratory judgment has no coercive effect, and this may be a disadvantage to one who wishes the court to quash an order or to compel the exercise of a sound discretion. A more popular remedy where discretionary powers have been abused has been the order of mandamus.

* * * * *

(b) *Mandamus* [63]

By a singular feat of judicial law-making, a remedy devised to restore persons to public offices from which they had been illegally excluded has been converted into a comprehensive remedy for controlling the exercise of administrative discretions.

Mandamus issues to secure the performance of a public duty. An authority entrusted with discretionary powers cannot be ordered to exercise them in any particular way, but if it has a duty to exercise a discretion and omits to do so then mandamus will go to order it to address itself to the matter. Similarly, an inferior court or a tribunal cannot be ordered how to exercise its jurisdiction, but if it refuses to adjudicate at all upon a case properly before it then it can be compelled to do so. In short, mandamus is an appropriate remedy where a public body has refused, in terms or in effect, to perform a ministerial duty,[64] including a ministerial duty to exercise a discretion, or where a court or tribunal has wrongfully declined to perform a duty to adjudicate.

A court or tribunal may wrongfully decline jurisdiction by deciding incorrectly on a preliminary or "collateral" point that it has no power to adjudicate. The reviewing court will be slow to interfere if the decision on the jurisdictional point turned upon a question of fact. As upon applications for certiorari and prohibition on the grounds of excess of jurisdiction, considerable difficulty is often encountered in distinguishing between a decision upon a preliminary or collateral point, which is open to review, and a decision upon the "merits," which is not.[65] Again, a court or administrative tribunal may decline jurisdiction, or decline to exercise its discretion, as the case may be, by failing to decide the case before it and instead deciding a point not before it [66]; or by using a power colourably in order to effect an entirely unauthorised

62 The *Wednesbury Case* [1948] 1 K.B. 223 is one of the few instances.

63 The conditions under which mandamus will issue will not be fully summarised here. For observations on its early history, see de Smith (1951) 11 Camb.L.J. at 50 *et seq.*

64 To agree to perform an absolute duty only if conditions are complied with by others is to refuse to perform it: *R.* v. *Tynemouth R.D.C.* [1896] 2 Q.B. 219, 451; *R.* v. *Lancaster (Inhabitants)* (1900) 64 J.P. 280.

65 See, *e.g.*, *R.* v. *Licensing Authority for Goods Vehicles for the Metropolitan Traffic Area, ex p. B. E. Barrett, Ltd.* [1949] 2 K.B. 17.

66 *Board of Education* v. *Rice* [1911] A.C. 179. Certiorari issues to quash the decision given.

purpose [67]; or by acting under the dictation of another body [68]; or by improperly delegating its power of decision to another body [69]; or by deciding applications before it by reference to a predetermined rule of policy without considering the merits of individual cases.[70]

These are all genuine illustrations of failure to perform a duty to decide. But a number of other cases go farther, in that mandamus has issued to bodies which have in fact exercised their jurisdiction or discretionary powers but which have exercised them improperly. They are based upon the fiction that a body that has exercised its powers arbitrarily or on irrelevant grounds has not exercised them at all. Dicta in some old cases indicate that persons endowed with discretionary powers are deemed not to have exercised them if they have acted capriciously [71] or with corrupt motives.[72] In the leading case of *R.* v. *Adamson* [73] the law was placed on its present footing. The court ordered mandamus to go to justices who had refused to issue summonses for conspiracy against persons who were alleged to have broken up a public meeting on the *Tichborne Case*. It was held that "the magistrates must have acted upon a consideration of something extraneous and extrajudicial, which ought not to have affected their decision [namely, their distaste for the views expressed at the meeting], and which . . . was *the same as declining jurisdiction.*" [74] This idea can be formulated without introducing the concept of jurisdiction. As was said by Lord Esher M.R. in another much-quoted passage [75]: "If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion." In order to justify the issue of mandamus, the courts have disregarded the principle that the existence of jurisdiction does not depend on regularity of its exercise, and have equated abuse of discretion with its non-user. The reports contain dozens of cases, most of them in the field of licensing law, in which mandamus has issued to order a tribunal to hear and determine an application which it had already considered but had refused on irrelevant grounds. Some cases appear to go further, in that mandamus has issued to a tribunal to hear and determine when it had in fact *granted* the

[67] *R.* v. *Lord Leigh* [1897] 1 Q.B. 132.
[68] *Ex p. Duncan* (1904) 4 S.R. (N.S.W.) 217; see also *R.* v. *Stepney Corporation* [1902] 1 K.B. 317.
[69] *R.* v. *Burnley JJ.* (1916) 32 T.L.R. 695.
[70] Authorities are reviewed in *R.* v. *P.L.A., ex p. Kynoch, Ltd.* [1919] 1 K.B. 176 and *R.* v. *Torquay Licensing JJ., ex p. Brockman* [1951] 2 K.B. 784; see note (1952) 15 M.L.R. 73.
[71] *R.* v. *Archbishop of Canterbury* (1812) 15 East 117 at 125–126, 139.
[72] *R.* v. *Governors of Darlington Free Grammar School* (1843) 12 L.J.Q.B. 124 at 128.
[73] (1875) 1 Q.B.D. 201; *cf. R.* v. *Boteler* (1864) 33 L.J.M.C. 101.
[74] 1 Q.B.D. at 205; see also *R.* v. *Board of Education* [1910] 2 K.B. 165 at 179.
[75] *R.* v. *Vestry of St. Pancras* (1890) 24 Q.B.D. 371 at 375.

application before it but had qualified its approval by imposing conditions that showed it had taken irrelevant factors into account and had misconstrued the scope of its powers.[76] These latter decisions have been criticised on the ground that there the tribunals had obviously not declined jurisdiction but had exercised it wrongly. But they are no more anomalous than those in which tribunals have been held to decline jurisdiction by refusing applications on improper grounds. In neither class of case did the tribunal decline jurisdiction. There is no declining of jurisdiction unless a tribunal has refused an application before it on the ground that, whatever may be the merits of the application, it has no power to grant what has been asked for, or unless it has " in substance shut its ears to the application which was made to it, and has determined upon an application which was not made to it." [77]

A tribunal that has decided a case by reference to extraneous considerations is often said to have declined jurisdiction through having failed to " hear and determine according to law." Failure to hear and determine according to law is supposed to mean something more than error in the exercise of jurisdiction,[78] which is not a ground for mandamus; but it has been held to include the " refusal of true jurisdiction " by the commission of flagrant errors in applying the relevant statute law to the facts of the case, for in such cases the tribunal " must have been guided by extraneous considerations " or " must have misunderstood the nature of the jurisdiction entrusted to it " and therefore " constructively declined jurisdiction." [79] Mandamus has thus been used not merely as a method of controlling the exercise of discretionary powers, but also, in some cases, as a method of indirectly overruling findings of law and fact.

The concept of constructive declining of jurisdiction, allied with the still vaguer concept of failure to hear and determine according to law, might have been used to enable mandamus to cover all the ground occupied by certiorari and the appeal by way of case stated and so render these remedies superfluous. However, the courts have drawn a line beyond which mandamus will not extend. For example, it will not issue, except in combination with certiorari, to a body that has wrongfully assumed and then exercised jurisdiction over a matter outside its competence [80]; or to order a rehearing by a tribunal where the previous hearing was vitiated by

[76] *R.* v. *Bowman* [1898] 1 Q.B. 663; *R.* v. *Dodds* [1905] 2 K.B. 40; *R.* v. *Shann* [1910] 2 K.B. 418; *R.* v. *Wandsworth Licensing JJ.* [1921] 3 K.B. 487.

[77] *R.* v. *P.L.A., ex p. Kynoch, Ltd.* [1919] 1 K.B. 176 at 183.

[78] *R.* v. *Cotham* [1898] 1 Q.B. 802 at 806; *R.* v. *P.L.A., supra*; *R.* v. *War Pensions Entitlement Appeal Tribunal* (1933) 50 C.L.R. 228 at 242–243.

[79] *R.* v. *de Rutzen* (1875) 1 Q.B.D. 55; *R.* v. *Vestry of St. Pancras, supra*; *R.* v. *Cotham, supra; Ex p. Hebburn, Ltd., re Kearsley Shire Council* (1947) 47 S.R. (N.S.W.) 416 at 420.

[80] *R.* v. *Nicholson* [1899] 2 Q.B. 455.

the interest of its members.[81] Whether mandamus may properly issue without a certiorari to a tribunal that has infringed the *audi alteram partem* rule of natural justice by failing to give both sides a hearing is doubtful, but the point is purely academic because certiorari is always appropriate for this purpose.[82]

VI

Three main conclusions emerge from this study : that the reasoning used in applying the main judicial remedies is often tortuous and artificial, that the courts have given apparently contradictory decisions on points of difficulty, and that certiorari is not a wholly satisfactory remedy in administrative law. This is not to deny that the adaptation of the prerogative writs to the function of correcting abuses in the administrative process has been a major achievement of the English courts of common law. It is significant that the same remedies have been used for the same ends and are governed in their scope by substantially the same rules in the common law jurisdictions throughout the Commonwealth, in the Republic of Ireland, and also, with minor variations, in the United States. They are also employed in the laws of Ceylon and Quebec; and in Scotland and South Africa, although the remedies differ, the substantive rules governing the scope of judicial review are fundamentally similar.

The cumbrousness of certiorari is explained by its historical association with courts and with the concept of jurisdiction. It issues only to inferior courts and other bodies that exercise judicial functions; it is primarily a remedy for excess of jurisdiction. In order that it may be used to quash acts and decisions of administrative bodies they must be characterised as judicial or quasi-judicial bodies and the inquiry into the legality of their acts and decisions is usually conducted in the language of jurisdiction. If the disadvantages of certiorari were confined to the matter of clumsy terminology they could be suffered with equanimity, but in fact they go further. The concepts in which certiorari is rooted may be admirable for the supervision of ordinary courts, but they are not always adequate for the supervision of administrative bodies.

If an administrative body commits an error of law or fact in performing its functions, or misuses a discretionary power by acting arbitrarily or on irrelevant grounds, it may be held to have acted *ultra vires*. But if its conduct is impugned by certiorari it follows that (a) the body must be treated as judicial, and judicial error cannot normally be traversed unless it concerns a collateral or

[81] *R.* v. *Kent JJ.* (1880) 44 J.P. 298. *R.* v. *L.C.C., ex p. Akkersdyk* [1892] 1 Q.B. 190, which contradicts this rule, was decided at a period when it was thought that licensing bodies were not amenable to certiorari; it is an anomalous decision on the scope of mandamus.

[82] It is difficult to imagine why the appropriateness of certiorari was questioned in the recent *Brighton Area Rent Tribunal Case* [1950] 2 K.B. 410 at 417.

preliminary matter; and (b) what is material is whether or not the body has exceeded jurisdiction, and abuse of discretion does not usually touch jurisdiction. In practice most errors of law and fact by administrative bodies have been assumed in certiorari proceedings to relate to collateral matters and have thus been made amenable to review. To this extent, therefore, reviewing the conduct of administrative bodies in the light of jurisdictional standards has not restricted the sphere of judicial control, although it has caused inapposite language and questionable reasoning to be used in the judgments. But what is unsatisfactory is that abuse of discretion may constitute a breach of the *ultra vires* doctrine and yet lie beyond the reach of certiorari because it is not a jurisdictional matter.

Can the scope of certiorari be extended by judicial decision to remedy this situation? "The scope of the prerogative writs . . . may not yet be exhausted"[83]: but it would need a singularly courageous court to cut certiorari free from its entanglement with the concept of jurisdiction. There are those who will say that to enlarge the scope of certiorari to cover abuses of discretion is unnecessary because the work is already being done by mandamus and that in doubtful cases the desired result can usually be achieved by a combined application for certiorari and mandamus.[84] The answer to this argument is that the availability of mandamus in this context is more often than not based on a threadbare pretence that a jurisdiction or discretion abused has never been exercised, and fictions are an unsound foundation for the law. Moreover, the exact scope of mandamus is far from clear; and this uncertainty is largely accounted for by the tenuous reasoning by which the issue of the order is often justified.

The present law of judicial remedies does not call for radical revision; but if the analysis that has been made in this article is correct some changes are desirable. The arguments in favour of change are strengthened by recent evidence that the courts themselves are by no means certain of the principles that should govern the issue of the remedies.[85] The law would be clarified if the ambit of certiorari and prohibition were to be confined to courts *stricto sensu*, and if they were to be replaced by decrees of annulment and injunctions in relation to administrative bodies. Review would then proceed on the basis not of jurisdiction but of *vires*. Thus, the exercise of a discretion on irrelevant grounds would justify the issue of a decree of annulment. These changes would not inevitably lead to any substantial increase in the scope of review. Reviewing courts would usually reach the same conclusions as

[83] Lord Justice Denning, "The Universities and Law Reform" (1949) 1 J.S.P.T.L. (N.S.) 258 at 268.

[84] It is impossible to combine an application for certiorari or mandamus with an action for a declaration.

[85] See, *e.g.*, the *Salford*, *Pontypridd* and *Brighton Cases*, cited notes 19, 59 and 82, *supra*.

at present, but by a less circuitous route. The new remedies would not solve all or most of the problems of judicial review, but they would make it possible to discuss them without constant recourse to the jargon of jurisdiction. They would also enable mandamus to be confined to a narrower but more appropriate field of operation.[86] Further, they would reduce the dangers of losing a sound case as a result of selecting the wrong remedy.[87]

Implicit in these proposals is the assumption that the total area of review covered by the existing remedies corresponds roughly with what, in the present state of our statute law, it is desirable for them to cover. Some writers complain that these remedies do little more than scratch the surface of the administrative process; that they penalise the administration for technical and formal errors but too often fail to give redress for the unreasonable or oppressive use of powers. But if the scope of judicial review is inadequate, surely the true explanation is the form in which powers are conferred on administrative bodies. It is the duty of the courts to interpret and apply the intention of the legislature in so far as this can be elicited from the words it has used; and a vast amount of modern legislation is drafted in language that plainly shows an intention to exclude or attenuate judicial review of administrative action. Powers are conferred in terms so broad that it becomes virtually impossible for a court to say that they have been exceeded. If Parliament makes an administrative authority judge in its own cause, or empowers it to disregard the *audi alteram partem* rule, the common law rules of natural justice cannot apply to it. Tribunals are empowered to judge conclusively the limits of their own jurisdiction and to make decisions that need be related only to their own conceptions of public policy. The courts are justifiably chary of appearing to substitute their own opinions for those of administrative bodies on matters that may be the subject of political controversy or involve specialised technical or local knowledge.

There can be no question of any appreciable expansion of the present system of judicial review until the initiative is taken by Parliament—that is to say, by the government that controls Parliament. Of that initiative there is no sign. If a new system of specially staffed administrative courts of appeal were to be established the administration might show less reluctance to submit its conduct to review. But the ghost of Dicey still stalks Westminster and the Temple, and only when it has been exorcised will such a proposal receive the dispassionate investigation that it deserves.

S. A. de Smith.[88]

[86] There is a case for relieving mandamus of certain restrictive rules that limit its availability in its proper field.

[87] "The problem of whether a prerogative writ will lie bears a startling resemblance to the question whether the proper form of action had been followed" (Stanley E. Edwards in (1947) 25 Can.B.R. at 1159).

[88] Lecturer in Law at the London School of Economics and Political Science.

THE TORT OF CONSPIRACY

THE tangle of cases which was the source of the civil law of conspiracy has to a great degree been clarified by the decision of the House of Lords in *Veitch's Case*.[1] The tort of conspiracy is now a fairly clear passage of the law. But it is the purpose of this article to submit that in their most laudable desire to inject sense and rationality into a confusing topic, the House of Lords in *Veitch's Case* erected a principle of a peculiar flavour and of doubtful practical value.

Before *Veitch's Case*, and indeed after it in some places, it was customary to say that the tort of conspiracy arose when there was an agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means, causing damage to the plaintiff. This definition would seem to be based on a fallacy in logic. For it was generally agreed that unlike the crime of conspiracy, the mere fact of agreement could not constitute the tort. To give rise to tortious liability there must be some carrying out of the agreement, causing damage. But it would seem evident that if there is some carrying out of an agreement to do an unlawful act or to employ unlawful means then this is equivalent to the doing of an unlawful act. In other words, under this definition, the existence of a tort of conspiracy would be quite otiose, for the defendants could always be sued as joint tortfeasors under some other specific heading of tortious liability. Indeed this view of conspiracy meant that a confusing element was often introduced into cases which could have been decided quite simply under the definition of some existing tort. For example the case of *South Wales Miners Federation* v. *Glamorgan Coal Co.*[2] has been quoted as authority[3] in a vigorous argument supporting the definition of conspiracy as outlined above. In that case the appellants induced miners to break their contracts of service with the respondents, with the object of sending up the price of coal and in consequence of increasing their wages. The House of Lords found the appellants liable. In the course of his speech Lord James said : " The defendants' intention clearly was that the workmen should break their contracts. Their motives no doubt were that by so doing wages should be raised. But, if, in carrying out the intention, the defendants purposely procured an unlawful act to be committed, the wrong that is thereby inflicted cannot be obliterated by the

[1] *Crofter Harris Tweed Company* v. *Veitch* [1942] A.C. 435.
[2] [1905] A.C. 239.
[3] *Vide* 36 L.Q.R. 38, " Conspiracy as a Ground of Liability in Tort," by Dr. J. Charlesworth.

existence of a motive to secure a money benefit to the wrongdoers."

The learned author of the article referred to treated this as a case of conspiracy and therefore argued that the essential element of conspiracy is not purpose or motive or malice, but the agreement to do an unlawful act. The argument would be sound but for the weakness of its premise. Lord James was pointing out that an unlawful act does not become lawful simply because of a good motive. The defendants were clearly liable for the tort of interference with contract. The case has nothing to do with conspiracy. It was an action against joint tortfeasors for inducing the breach of a valid, existing contract. If there had been a single defendant the result would have been the same, and conspiracy was not a relevant element.

To get a clear picture of the tort the first essential is then to realise that whenever the defendants have done an act which can be brought under the heading of some other specific tort there is no question of conspiracy. Or at any rate there should be no such question, for to introduce it is merely to confuse and complicate a simple issue. (A similar situation may be perceived in the criminal law of conspiracy; *vide R.* v. *Cooper and Compton.*[4])

It is submitted that if conspiracy is to have any meaning as a tort it should be confined to acts which if done by one person would not give rise to liability. If it is so confined then it does indeed constitute a new head of liability. But unfortunately, even in *Veitch's Case*, the House of Lords, although they make it clear that conspiracy does include such cases, still appear from their language to embrace the old definition as well, *i.e.*, to include acts which have a separate tortious existence apart from conspiracy. This is to be regretted for it retains the superfluous element. This point was perceived and treated of by Lord Sumner in *Urquhart* v. *Clark*,[5] where the noble lord said: "As to the measure of damages, it may be that there are cases in which proof that a joint tort was done in pursuance of a conspiracy to do it, will justify some increase of the damages to be awarded for the tort itself, though none such has occurred to me. . . . A plaintiff cannot be allowed simply by using one technical term where another would equally cover the wrong to aggravate the jury into giving him extra money."

The major importance of *Veitch's Case* then is that it gave certainty to the unsettled doctrine that, in some circumstances, an act which if done by one person is lawful can be unlawful if done by more than one person in combination. And *Veitch's Case* of course also confirms for us what those circumstances are in which this situation arises. It can be stated quite simply by saying that

[4] (1947) 32 Cr.App.R. 102.
[5] [1930] A.C. at p. 50.

all combinations which injure another person are unlawful unless the real purpose of the combination is not to injure another but to further or protect the legitimate interests of those combining.

Two extremely interesting points emerge. First, the House of Lords has in effect created a general theory of tortious liability for two or more people acting in combination. While an individual cannot be successfully sued in tort unless his act can be brought within the ambit of a specific tort, two combining individuals who cause damage can always be sued unless they can prove the purity of their motives. Conspiracy has become a tort of megalomaniac pretensions which in effect is not a specific tort at all but a declaration of general tortious liability for two or more acting in concert. The House of Lords seems to have been aware of this, although it is not directly mentioned in the speeches, and seems not to have been troubled by its possibilities.

Secondly, as has often been demonstrated, what is vital is the motive of the combiners. A bad motive will here convert an otherwise lawful act into an unlawful one, or, to reverse the proposition, a good motive will deprive an otherwise unlawful act of its unlawful character. Now the general principle of English civil law has of course always been that a lawful act cannot be made unlawful simply by an impurity of motive. Authoritative statements in support of this principle are legion. It will be sufficient to quote two. In *Allen* v. *Flood*,[6] Lord Watson said: "The existence of a bad motive in the case of an act which is not in itself illegal will not convert that act into a civil wrong for which reparation is due." In *Bowen* v. *Hall*,[7] Lord Coleridge said: "I do not know . . . that it has ever been held that the same person for doing the same thing, under the same circumstances with the same result, is actionable or not actionable, according to whether the inward motive was selfish or unselfish for what he did." It now appears then that when we are dealing with persons and not a person the old learning is to be ignored and motive is all important. This trend in the tort of conspiracy, now finally confirmed by *Veitch's Case* was commented on as long ago as 1892 in an article in the *Law Quarterly Review*.[8] Writing of the novelty and uncertainty of the motive test, the learned author said: "But it is difficult to see how malice . . . can possibly form an element in what, for want of a better word, may be called 'unfair competition in trade.' How can motive in such a case be determined? Is it to be said that a given interference with the trade of another is lawful if the act is done for the object of personal gain, but unlawful if done with the object of causing loss to a rival? The attempt to distinguish between the two at law . . .

[6] [1898] A.C. 1.
[7] (1881) 6 Q.B.D. 333.
[8] 8 L.Q.R. 140, "Malice in the Law of Torts," by Ormesby J.

seems to me about as reasonable as to make it a rule of billiard pool that ' a life,' if taken with the object of increasing the striker's score, counts, but that it does not count if the object be to keep down the score of an opponent."

As another writer has observed,[9] motive in this context is as difficult to determine as to decide whether a soldier fires for the purpose of injuring the enemy or of defending his country.

Not only in its general but also in its particular application is motive an unsatisfactory test. *Veitch's Case* tells us that if the motives are mixed, we must look for the predominant purpose. But what if A and B combine and A is clearly acting to protect his own interests while B is clearly acting with a malicious desire to injure the plaintiff? How then can we find a predominant purpose? In the case of *Pratt* v. *British Medical Association*,[10] McCardie J. expressed a definite view on this point to the effect that "the proved malice of one or more may be attributed to the other participants of the combination." But in the case of *McKernan* v. *Fraser and Another* in the High Court of Australia,[11] Evatt J. thought that even if it had been established that the defendant himself had acted merely to gratify a private grudge he would still not be liable for conspiracy unless it could be shown that those who acted with him had been similarly impelled. And he was of the opinion that even if several members were so actuated they would not render themselves so liable unless the common purpose was malicious. This point is then still unsettled and since it is not merely an academic hypothesis, but one very likely to arise in practice, it demonstrates the insufficiency of the test.

In *Veitch's Case*, Lord Simon adopted a passage from the judgment of Phillimore J. in *Boots* v. *Grundy*,[12] where the learned judge said: "If the combination be to further their own prosperity, if it be constructive or destructive only as a means to being constructive, it is otherwise" (*i.e.*, it is not actionable). When the result of an action depends on distinguishing between an act which is purely destructive and one which is destructive as a means to being constructive, we are driven to conclude that the civil law of conspiracy has slipped into casuistry.

A final and curious matter is the extent to which this view of the tort of conspiracy impinges on the criminal law. The definition in *Veitch's Case* forces us to conclude that if, in the case of the *Mayor of Bradford* v. *Pickles*,[13] Mr. Pickles had been unlucky enough to associate himself in his enterprise with a neighbouring landowner or presumably even with an assistant, he would have been liable for the tort of conspiracy under the present view of it.

[9] Professor D. J. Llewelfryn Davies in 49 L.Q.R. 326.
[10] [1919] 1 K.B. 244.
[11] *Vide* note by Professor D. J. Ll. Davies in 49 L.Q.R. 326.
[12] (1900) 82 L.T. at p. 773.
[13] [1895] A.C. 587.

Presumably then he would also incur criminal liability for the crime of conspiracy, for it has always been assumed that the two go hand in hand.

And here we come face to face with the curse of legal reasoning —the vicious circle. We are told that we have the tort of conspiracy in a combination to injure, though the act may be lawful if done by one. But a combination to do a lawful act could not be the crime of conspiracy. Presumably it now may be the crime since the definition of the tort now will make the carrying out of the combination unlawful, if its predominant purpose is to injure another. This means that the broadening of the tort has also broadened the crime. And yet we are told that the tort depends upon the crime. This can be seen in the definition of the tort given in Jenks' *Digest of the Civil Law*[14]: "If two or more persons enter into a criminal conspiracy with the design of causing harm to another person and harm is directly caused by such conspiracy to such person, such person will have an action for damages, etc." Does the crime make the tort, or the tort make the crime, or are they quite independent?

The only way of cutting the knot would seem to be to declare that since *Veitch's Case* the historical dependence of the tort upon the crime is at an end.

In conclusion it is submitted that the existence of the tort of conspiracy is not a valuable addition to the scope of the English law of tort. Where there is a combination to do an act in itself unlawful, then an adequate remedy already exists. Where the combination is to do an act not in itself unlawful, then the present sweeping principle based on the most unsatisfactory of all tests would seem to be a needless extension of the law. The extreme paucity of successful actions for conspiracy indicates this, for, as has already been suggested, many cases, commonly quoted as cases of conspiracy, were or could have been decided under the heading of other torts.

G. J. Hughes.[15]

[14] Jenks, *English Civil Law*, 4th ed., p. 450.
[15] Assistant Lecturer in Law at University College, Hull.

RECENT PERIODICAL LITERATURE

(1) *General.* E. K. Braybrooke: "Custom as a Source of English Law," 50 Mich.L.R. 71. E. N. Cahn: "Authority and Responsibility," 51 Col.L.R. 838. Sir C. T. Carr: "The Statutes Revised, 1950," 67 L.Q.R. 482. C. P. Curtis: "The Ethics of Advocacy," 4 Stanf.L.R. 3. D. Daube: "The Scales of Justice," 63 Jurid.Rev. 109. E. A. Driedger: "A New Approach to Statutory Interpretation," 29 Can.B.R. 838. C. d'O. Farran: "First Impressions of Austrian Law," 63 Jurid.Rev. 50, 156. J. Frank: "Both Ends against the Middle," 100 U. of Pennsylv.L.R. 20: on legal education. J. Frank: "Short of Sickness and Death: a Study of Moral Responsibility in Legal Criticism," 26 N.Y.U.L.Rev. 345. W. Friedmann: "Judges, Politics and the Law," 29 Can.B.R. 811. H. F. Goodrich: "The Story of the American Law Institute," 1951 Wash.U.L.Q. 283. F. H. Lawson: "The Annual Survey of American Law," 1 Int. and Comp.L.Q. 3. E. W. Patterson: "Historical and Evolutionary Theories of Law," 51 Col.L.R. 681. R. Pound: "Philosophy of Law and Comparative Law," 100 U. of Pennsylv. L.R. 1. R. Pound: "Soviet Civil Law: a review," 50 Mich.L.R. 95. E. S. Rashba: "Consecrated Ignorance of Foreign Law," 39 Calif.L.R. 355. F. Roberti: "The Role of Canon Law in Comparative Law," 11 Jurist. 451. R. Schlesinger: "Justice in Russia: a dissent," 60 Yale L.J. 976. "What Makes a Successful Tax Lawyer?: A Tax Law Review Symposium," 7 Tax L.R. 1. L. B. Boudin: "The Settler Within Our Gates," 26 N.Y.U.L.Rev. 266, 415, 634.

(2) *Constitutional Law.* M. E. Bathurst: "Legislation in the Federal Republic of Germany," 1 Int. and Comp.L.Q. 40. Z. Chafee, Jr.: "Federal and State Powers under the United Nations Covenant on Human Rights," (1951) Wis.L.R. 389, 623. W. Christian: "Burma's new Constitution and Supreme Court," 26 Tulane L.R. 47. C. J. Hamson: "Le Conseil d'Etat Statuant au Contentieux," 68 L.Q.R. 60. "The Nationalisation of British Industries," 16 Law and Contemp.Prob.No. 4. E. L. Richardson: "Freedom of Expression and the Function of Courts," 65 Harv.L.R. 1. D. S. Stern: "Full Faith and Credit—the Mexican Experience," 26 N.Y.U.L.Rev. 663. H. Weinschel: "The Constitutions of the Fourth French Republic and of the Italian Republic: a comparative study," 20 Geo.Wash.L.R. 127.

(3) *Administrative Law.* C. J. Antieau: "The Power of Municipal Corporations to Protect the Public Health and Safety," 1951 Wash.U.L.Q. 358. C. Ettori: "Le Contrôle Juridictionnel de l'Administration en Italie," 67 Rev. Droit Public 997.

(4) *Family Law.* Z. Cowen: "Domestic Relations: Actions for Loss of Consortium," 25 Austr.L.J. 390. R. Gottschalk: "Personal Status and Religious Law in Israel," 4 Int.L.Q. 454. G. W. Wilton: "Peccavis in Divorce Law and Practice," 63 Jurid.Rev. 130.

(5) *Law of Property and Succession.* C. H. Alexander: "Foreign Investment Laws and Regulations of the Countries of Asia and the Far East," 1 Int. and Comp.L.Q. 29. G. Craven: "Powers of Appointment Act of 1951," 65 Harv.L.R. 55. E. L. Fisch: "Judicial Attitude Towards the Application of the *cy-près* Doctrine," 25 Temple L.Q. 177. R. Gottschalk: see (4). G. B. Graham: "Tenants in Possession and Third Parties," 15 Conv.(N.S.) 381. J. Gutteridge: "Expropriation and Nationalisation in Hungary, Bulgaria

and Roumania," 1 Int. and Comp.L.Q. 14. "Institutional Investments," 17 Law and Contemp.Prob.No. 1. W. B. Leach: "Perpetuities: Staying the Slaughter of the Innocents," 68 L.Q.R. 35. R. E. Megarry: "The Rent Acts and the Invention of New Doctrines," 67 L.Q.R. 505. G. E. Palmer: "Testamentary Disposition to the Trustee of an *inter vivos* Trust," 50 Mich. L.R. 33. P. Roubier: "Le Droit Unioniste de la Propriété Industrielle," 78 J. du Droit Internat. 676, 1040. M. Saporta: "De Certaines Expropriations du Droit d'Auteur dans les Rapports Internationaux," 78 J. du Droit Internat. 1120. E. H. Scammell: "The Special Position of Limited Owners of Agricultural Land," 15 Conv.(n.s.) 415. N. Siegel: "Trends in Federal Rent Control Decisions," 13 U. of Pittsburgh L.R. 1. J. B. Sweetman: "Relief from Forfeiture of Leases," 15 Conv.(n.s.) 406. "What Makes a Successful Tax Lawyer?": see (1). J. W. Willis: "Some Miscellaneous Methods of Fixing Maximum Rents," 6 Loyola L.R. 14.

(6) *Law of Contract.* M. Ferson: "Agency to Make Warranties," 5 Vanderbilt L.R. 1. J. G. Fleming: "Misrepresentation and the Sale of Goods," 25 Austr.L.J. 443. J. D. Smith: "A Refresher Course in Cause," 12 Louisiana L.R. 2. B. Smyrniadis: see (14).

(7) *Law of Tort.* Z. Cowen: "The Adequate Award: a Footnote," 39 Calif.L.R. 377. L. W. Levy: "Chief Justice Shaw and the Formative Period of American Railroad Law," 51 Col.L.R. 327, 852. W. A. Seavey: "Candler *v.* Crane, Christmas & Co.: Negligent Misrepresentation by Accountants," 67 L.Q.R. 466.

(8) *Commercial Law.* K. S. Carlston: "Antitrust Policy: a Problem in Statecraft," 60 Yale L.J. 1073. C. E. Corker: "Risk of Loss from Forged Indorsements: a California Problem," 4 Stanford L.R. 24. R. J. Cudney: "Corporations Without Share Capital," 29 Can.B.R. 846. D. C. Draper: "What is a 'Clean' Bill of Lading? a Problem of Financing International Trade," 37 Cornell L.Q. 56. M. Ferson: see (6). J. G. Fleming: see (6). G. Hornsey: "Share Values and Premiums," 67 L.Q.R. 522. "Institutional Investments," see (5). E. G. Martin: "The Conflict Between Foreign Trade Agreements and Price-support Programs," 37 Cornell L.Q. 17. "Some Effects of the Uniform Commercial Code on New York Law—a Symposium," 26 St. John's L.R. 1. B. Weintraub and H. Levin: "Bulk Sales Law and Adequate Protection of Creditors," 65 Harv.L.R. 418. D. McC. Wright: "Some Pitfalls of Economic Theory as a Guide to the Law of Competition," 37 Virg.L.R. 1083.

(9) *Industrial and Labour Law.* K. S. Carlston: see (8). C. Kirshner: "The Colour Television Controversy," 13 U. of Pittsburgh L.R. 65. "The Nationalisation of British Industries": see (2). J. R. Newman: "The Atomic Energy Industry: an Experiment in Hybridization," 60 Yale L.J. 1263. J. W. Raisbeck, Jr.: "Labor Legislation of Columbia," 26 Tulane L.R. 1. D. McC. Wright: see (8).

(10) *Law of Evidence.* P. B. Carter: "Evidence Act, 1938: Problems of Interpretation," 68 L.Q.R. 106. E. L. Fisch: "Lay Opinions in New York," 37 Cornell L.Q. 32.

(11) *Civil Procedure.* "Reform of Civil Procedure—a Symposium," 40 Kentucky L.J. No. 1.

(12) *Criminal Law and Procedure and Criminology.* R. Cross: "Larceny by an Owner and *Animus Furandi*," 68 L.Q.R. 99. Th. Sellin: "The Signiñcance of Records of Crime," 67 L.Q.R. 489. R. J. Waybright: "Florida's New Juvenile Court Act," 6 Miami L.Q. 1.

(13) *Conflict of Laws.* C. H. Alexander: see (5). Z. Cowen: "Divorce and the Domicile," 68 L.Q.R. 88. A. A. Ehrenzweig: "The Place of Acting in International Multistate Torts: Law and Reason Versus the Restatement," 36 Minn.L.R. 1. R. Gottschalk: see (4). E. N. Griswold: "Divorce Jurisdiction and Recognition of Divorce Decrees: a Comparative Study," 65 Harv.L.R. 193. J. Gutteridge: see (5). W. D. Hawkland: "Control of Foreign Corporate Activity by the State of Incorporation," 6 Miami L.Q. 41. P. Roubier: see (5). M. Saporta: see (5). J. R. Stevenson: "Effect of Recognition on the Application of Private International Norms," 51 Col. L.R. 710.

(14) *International Law.* C. H. Alexander: see (5). M. Brandon: "Final Clauses in Multilateral Conventions," 4 Int.L.Q. 467. Z. Chafee, Jr.: see (2). L. C. Green: "The Nature of the 'War' in Korea," 4 Int.L.Q. 462. J. Gutteridge: see (5). P. E. Jacob: "The Legality of United Nations Action," 13 U. of Pittsburgh L.R. 29. D. H. N. Johnson: "Control of Exploitation of Natural Resources in the Sea Off the United Kingdom," 4 Int.L.Q. 445. P. Roubier: see (5). M. Saporta: see (5). J. R. Stevenson: see (13). K. Wilk: "International Law and Global Ideological Conflict: Reflections on the Universality of International Law," 45 Am.J.Int.L. 648. B. Smyrniadis: "Le Sort, en cas de Guerre, des Traités de Droit Privé," 55 Rev. gén de Droit Internat. Public 439.

W. A. Steiner.

NOTES OF CASES

Certiorari and Speaking Orders

The important decision of the Divisional Court in *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1951] 1 K.B. 711, in which it held that certiorari would issue to quash the decision of a statutory tribunal where error of law appeared on the face of the record, has been affirmed by the Court of Appeal ([1952] 1 T.L.R. 161). The case was noted in 14 Mod.L.R. 207, but the judgment of Denning L.J. in the Court of Appeal raises some interesting points and calls for further comment.

In the Court of Appeal it was again contended for the tribunal that certiorari did not lie to quash the decision of a statutory tribunal for a patent error of law unless the error went to jurisdiction. All members of the court rejected this contention. Singleton and Morris L.JJ. substantially repeated the reasoning of Lord Goddard C.J. in the court below. The jurisdiction of the King's Bench Division in this matter is supervisory, not appellate, since a court is limited to quashing the order and cannot substitute its own order for that of the tribunal. (In describing the court in the earlier note as exercising "what is in effect an appellate jurisdiction" the writer was guilty of a lamentable malapropism.) Denning L.J. sought to establish that there were precedents for the present decision, and cited cases concerning the Commissioners of Sewers and auditors' certificates. But the Commissioners of Sewers had been made a court of record by statute; and auditors' certificates were removed by a statutory certiorari, which was, unlike common law certiorari, generally treated as being a method of appeal. It seems probable that this is the first English case in which common law certiorari has issued to a body other than a court *stricto sensu* for error of law on the face of the record.[1] That the decision is a sound one can hardly be doubted. In many cases the courts have held that the other grounds on which certiorari will issue to quash the decisions of inferior courts apply, *mutatis mutandis*, to administrative tribunals. Why should they make an exception in this instance? To impute to Parliament, when it provided for the establishment of an administrative tribunal, an intention that the tribunal should be immune from a supervisory jurisdiction that had fallen into oblivion, is to display more ingenuity than persuasiveness. In any event Parliament can, by the use of apt words, exclude the jurisdiction of the courts. And whilst it is conceivable that the present decision may discourage

[1] There is a recent Canadian precedent: *John East Iron Works, Ltd.* v. *Labour Relations Board of Saskatchewan* [1949] 3 D.L.R. 51.

some tribunals from giving written reasons for their decisions in future,[2] such a possibility is obviously not one that should weigh with a court in determining the scope of certiorari.

It was also contended for the tribunal that, although it had erred, the error did not appear on the face of the record. Singleton and Morris L.JJ. held that this submission was not open to the tribunal, since it had conceded before the court below that the error was apparent on the record. Singleton L.J. held, moreover, that the error did appear on the record; Morris L.J. expressed doubts on this point. Denning L.J. took a different view, and considered the submission at some length. Following the cases on orders and convictions by justices, he held that the record of a tribunal must contain the document initiating the proceedings, the pleadings (if any) and the adjudication, though it need not include the evidence or the reasons for the decision. Here the record was incomplete in that, although it included the reasons for the decision, it did not include the claim originally lodged with the compensation authority or their order or the notice of appeal to the tribunal. The court had power to order the record to be completed. However, this was unnecessary, because it had been openly admitted that the decision was erroneous. He was " clearly of opinion that an error admitted openly in the face of the court can be corrected by certiorari as well as an error that appears on the face of the record " (at 172). It was a general rule that the courts could not take cognizance of errors of law that were not apparent on the record, but the parties could overcome this difficulty by consent, either by agreeing that the question should be argued and determined as if it had been expressed in the order (*R.* v. *Essex* (*Inhabitants*) (1792) 4 T.R. 591 and later cases) or by agreeing that affidavits be entered disclosing the points of law that had been decided by the tribunal. This course was taken only if no one objected. Recent cases showed that the practice still continued.

It is respectfully submitted that Denning L.J.'s statement of the law is too wide. There is not sufficient authority to support a general proposition that by consent of the parties affidavit evidence or admissions in the face of the court may properly be used to disclose errors of law that are not apparent on the record of a tribunal. Whilst it is true that in several old rating cases affidavits were admitted to disclose latent errors of law, in a number of well-known cases the courts have held that they are not admissible except to show excess or want of jurisdiction, breach of the rules of natural justice or fraud. Nowhere, it seems, has it been held that consent of the parties renders extrinsic evidence admissible for any other purpose in certiorari proceedings. In the cases cited by

[2] See the reply given by the Minister of Local Government and Planning to a parliamentary questioner who suggested that rent tribunals be advised to issue " speaking " orders in cases of difficulty: 447 H.C.Deb. 1732–1733 (May 8 1951).

Denning L.J. the point of admissibility was not argued, and they cannot be regarded as having established an authoritative exception to the general rule. Legal principles have sometimes been temporarily forgotten or ignored in other branches of the law until the true principle has been re-affirmed by the courts.[3] The two cases cited by Denning L.J. as exemplifying a modern practice of enlarging the jurisdiction of the courts by consent are inconclusive: one must be treated as anomalous,[4] and in the other the main purpose for which affidavits were admitted was to show that the tribunal had failed to observe the rules of natural justice[5]—an allegation that can undoubtedly be established by evidence dehors the record.[6]

Nevertheless, a strong case can be made for introducing a limited exception to the general rule. The "records" of administrative tribunals are not to be compared too closely with the formal records of courts *stricto sensu*. Thus, the High Court of Australia has held[7] that a statutory tribunal that is under no duty to keep a formal record need not recite in its orders the facts that invest it with jurisdiction. Where a statutory tribunal has made a speaking order, from which it is apparent that the tribunal has probably erred in law, but which is not wholly intelligible because of the omission of the preliminary recitals or the contentions of the parties, there is no reason of principle why extrinsic evidence and admissions in the face of the court should not be used to remove the cause of ambiguity.

S. A. de Smith.

Statutory Interpretation

Interpretation is always a difficult art, and in the interpretation of statutes the task is not made easier by the phraseology of the main canons. It is easy to say that if the words of the statute are clear then nothing can be added or taken away, but that if they are not it is possible to look at the mischief and find a necessary implication in the words of the statute. Yet what is clarity to one is obscurity to another. What is necessary implication to one is unwarranted interpolation to another. To say that is merely to repeat commonplaces and although therefore the decision of the House of Lords in *Magor and St. Mellons R. D. C.* v. *Newport Corporation* [1951] 2 All E.R. 839, may not deserve fame as bringing out new principles of interpretation it does at least merit notice as an admirable illustration of the conflict inherent in the old. The facts of the

[3] See, *e.g.*, the practice condemned in *Adams* v. *Naylor* [1946] A.C. 543.
[4] *R.* v. *West Riding of Yorkshire JJ., ex p. Broadbent* [1910] 2 K.B. 192; see also *R.* v. *Shann, ibid.*, 418; *R.* v. *Walton, ex p. Dutton* (1911) 75 J.P. 558.
[5] *G.M.C.* v. *Spackman* [1943] A.C. 627. *Cf.*, however, the observations of Singleton L.J. on this case (at 166).
[6] *R.* v. *Wandsworth JJ., ex p. Read* [1942] 1 K.B. 281.
[7] *R.* v. *Connell, ex p. Hetton Bellbird Collieries, Ltd.* (1944) 69 C.L.R. 407.

case have already been noted (Vol. 14, p. 206). It is sufficient to say that the House of Lords, Lord Radcliffe dissenting, upheld the interpretation of the majority of the Court of Appeal. Lord Simonds and Lord Morton were however outspoken in their criticism of some remarks which Denning L.J. had made in the court below on the functions of the courts in interpreting statutes. Those remarks are already well known and were quoted in the former note. It may well be that they contained some exaggeration in wording which could be misinterpreted. The learned Lord Justice himself almost said as much. Even when allowance is made for that, the conflict between the strict and more liberal approach to a statute is evident in the result. The interpretation given by Denning L.J. found favour with Lord Radcliffe, who in no way dissented from the generally accepted canons of interpretation. The difference of opinion between Lord Radcliffe and the other members of the House of Lords must, it seems, be accounted for by a difference in the weight given to the purpose of the Acts and Orders in question. That difference resulted in a decision which is perhaps unhappy for the ratepayers concerned and which Lord Radcliffe regarded as working an injustice.

The narrow point at issue is unlikely to recur, but the general principles of interpretation endure. Elsewhere (67 L.Q.R. 9) there has been comment on the unhappy results which sometimes flow from strict interpretation. It is possible that happier results might sometimes be achieved if greater weight be given to the underlying object of statutes. Indeed the chance juxtaposition of reports affords an illustration. In *Biddle* v. *Truvox Engineering Co., Ltd.*, [1951] 2 All E.R. 835, Finnemore J. quoted with approval a dictum of Lord Halsbury upon the question whether a statutory remedy excludes all others. Lord Halsbury said : " Whether the general rule is to prevail or an exception to the general rule is to be admitted must depend upon the scope and language of the Act . . . and on considerations of policy and convenience." Perhaps it is permissible to suggest that on that basis the interpretation given by Lord Radcliffe and Denning L.J. receives added support. Consideration of such matters need not lead either to uncertainty or to the usurpation by the courts of the functions of the legislature, but may have beneficial results.

J. D. B. Mitchell.

Sovereign Immunity

Kahan v. *Pakistan Federation* [1951] 2 K.B. 1003 is a decision which again emphasises the urgent necessity for a reconsideration of the law of immunity. The plaintiff had entered into a contract for the sale of goods with the defendant, a sovereign State. When disputes arose, he instituted proceedings, but was met with the plea of immunity. In the present state of the authorities which

only the House of Lords can and, it is hoped, will at some time overrule, the plaintiff could not rely on the trading character of the transaction or on the fact that the foreign State's trading activity had occurred in this country: *Krajina* v. *Tass Agency* [1949] 2 All E.R. 274, commented upon at (1949) 12 Mod.L.R. 494. However, he relied on a clause in the contract according to which the defendant State had expressly submitted to the jurisdiction of the English courts. The Court of Appeal (Jenkins and Birkett L.JJ.) rejected his argument and thus disappointed Mr. Fawcett's conclusion that "the principle of sovereign immunity is fast becoming an anachronism as far as State traders are concerned": "Legal Aspects of State Trading," *British Year Book of International Law 1948*, 34 at p. 47. In view of certain observations in *Duff Development Co., Ltd.* v. *Government of Kelantan* [1924] A.C. 797, the result was almost inevitable. In that case it was held that neither an arbitration clause, incorporating the provisions of the Arbitration Act, nor an application by the defendant State to set aside an award amounted to a submission to the jurisdiction of the courts. Some of their Lordships said that submission was possible only in the face of the court and the breach of a contract to submit was not the same as an actual submission. Though these remarks might be said to have been *obiter* and are perhaps not unimpeachable, the Court of Appeal could not but follow the guidance given by the House of Lords. The trouble is that, when applying rules which stem from and are said to represent international law, English courts consider themselves bound by national rather than international precedents. Art. 8 of the Draft Convention on jurisdiction over foreign States which the Harvard Research published in 1932 suggested that a State should not be entitled to immunity, if the State had previously consented to the institution of proceedings by a contract upon which the proceedings are based. The eminent authors described this rule as "so obviously equitable that its general acceptability may be assumed." They did not find any decision opposed to their solution (apart from the English cases), but discovered two Supreme Court decisions, from Germany and Greece respectively, which expressly supported their thesis: see *American Journal of International Law* (Supplement) 1932, 453, 548 *et seq.* There is reason to believe that, if in matters of international law English courts were able to free themselves from their self-imposed fetters and to follow international rather than national precedents, our present difficulties would not have arisen and the Departmental Committee, convened as a result of *Krajina's Case*, *ubi supra*, either would not be required or could suggest a convenient method for the adoption of such recommendations as it may make. Would it not be practicable to have the whole problem of the immunity of *l'État Commerçant* referred to the Judicial Committee of the Privy Council for authoritative clarification?

F. A. Mann.

CRIMINAL LAW—LARCENY—RECEIVING

IT is well settled that if a wife " steals " *de facto* from her husband, but is living with him and has no intention of deserting him (so that she does not steal *de jure*), and if she then gives the goods to a third party who has knowledge of the circumstances, the third party cannot be convicted of receiving stolen goods, because the goods have not been stolen. This being so, the decision in *Walters* v. *Lunt* [1951] 2 All E.R. 645 was inevitable. There the theft *de facto* was not by a married woman but by a boy under eight; it was held that his parents could not be convicted of receiving because the boy could not be convicted of stealing.

Could the parents have been convicted of anything else? If they had instigated the child to take the goods, they would have been guilty of stealing through an innocent agent; but of that there was no evidence. The concept of ratification is not applied in the criminal law. Lord Goddard C.J., with the concurrence of the other members of the court, suggested that the parents could be convicted of larceny by a bailee. With every respect, this seems to involve an undesirable fiction. For no other legal purpose would the parents have been regarded as the bailees of the true owner. If they were bailees from anybody, it was from their son; but they were not even bailees from him if he did not intend to have the goods back. Anyway they did not commit larceny as bailees from their son. Another suggestion made by Lord Goddard (indeed, as reported it was not so much a suggestion as a positive affirmation) was that if when the child brought the goods home the parents thought that the owner could be discovered by taking reasonable steps, the parents would be guilty of larceny by finding. Lord Goddard also intimated that it would be for the police to decide whether to prefer the charge of larceny. It seems somewhat unfortunate that the court should have uttered this *obiter dictum* so categorically, when it had not heard counsel for the parents (who did not appear on the appeal), and when there was a possibility that if a charge of larceny by finding were preferred, it would come back to the same court by way of appeal. The argument against the *obiter dictum* would seem to be cogent. Larceny by finding is not an offence on its own; it is ordinary larceny committed in certain circumstances, and it must comply with the rules of larceny. Two of these rules are that the prosecutor must be in possession at the moment of taking, and that the accused must obtain possession by the taking. How can it be said that the prosecutor was here in possession at the moment when the parents received from their son? In larceny by finding, the owner is deemed to be in possession although he has lost the thing and does not know where it is; but it would be going beyond any previous authority to say that the prosecutor is still in possession of goods that have been taken from him by another against his

will. Such a doctrine would make every receiver of stolen goods guilty of larceny.

What is needed is not a further distortion of the law of larceny but an amendment of the Larceny Act in respect of the offence of receiving. In Roman law, a wife or *filiusfamilias* could not commit *furtum* from the *pater*, but the thing became *res furtiva* and accomplices were liable. We need the same conception in England.

Glanville Williams.

Knowledge in Statutory Offences

Knowledge and the Burden of Proof

Where a principle of law is enunciated and, during the passage of over half a century, evokes no adverse comment its accuracy tends to become generally accepted. If such a pronouncement has been repeatedly cited with approval any doubts which may be expressed as to its correctness are likely to be viewed with suspicion. Nevertheless, Devlin J. in *Roper* v. *Taylor's Central Garages (Exeter) Ltd.* [1951] 2 T.L.R. 284, at pp. 287–288, took his stand on sure ground when expressing his doubts as to the accuracy of a well-known passage from the judgment of Day J. in *Sherras* v. *De Rutzen* [1895] 1 Q.B. 918, at p. 920, relating to the burden of proof in crimes involving the presence or absence of the word "knowingly." That ground has been well trodden before by others concerned to point out the confusion caused by the failure to indicate in which sense the phrase "burden of proof" is used.[1]

The offence in *Sherras* v. *De Rutzen* was supplying a police constable on duty with intoxicating liquor, contrary to section 16 (2) of the Licensing Act, 1872.[2] The prosecution contended that the offence was one in which proof of *mens rea* was not necessary, pointing out that whereas section 16 (1) made it an offence to "knowingly harbour on licensed premises any constable on duty," the epithet "knowingly" was missing from section 16 (2). Rejecting this argument Day J. stated that the absence of "knowingly" in section 16 (2) only *shifted* the onus of proof so that it was for the defence to prove lack of knowledge and not for the prosecution to prove that there was knowledge. R. S. Wright J., the other member of the court, made no reference to the effect on the burden of proof.

It is worth noting that this was not the first occasion where the above principle had been put forward, for Brett J. in *R.* v.

[1] See for example "Presumptions and Burdens," by Lord Justice Denning (1945) 61 L.Q.R. 379, and an article under the same title by Nigel Bridge (1949) 12 Mod.L.R. 273–289, in which Lord Justice Denning's reclassification of the conceptions involved under the general heading of burden of proof and presumptions is criticised, and an alternative reclassification is suggested.

[2] Now contained in the Licensing (Consolidation) Act, 1910, s. 78.

Prince (1875) 2 C.C.R. 154, at p. 161, had stated that "the ultimate proof necessary to authorise a conviction is not altered by the presence or absence of the word 'knowingly,' though by its presence or absence the burden of proof is *altered*." Although this rule was adopted without hesitation by Humphreys J. in *Gaumont British Distributors Ltd.* v. *Henry* [1939] 2 K.B. 711, at p. 721, the same judge is seen in *Harding* v. *Price* [1948] 1 K.B. 695 taking up a more cautious attitude. In the latter case, the Divisional Court was concerned with the wording of section 22 (2) of the Road Traffic Act, 1930, which replaced the corresponding section in the repealed Motor Car Act, 1903. Whereas under section 6 of the 1903 Act guilt depended on a person "knowingly acting in contravention of the section," section 22 (2) of the 1930 Act omits the word "knowingly," making it an offence simply to fail to report a road accident within twenty-four hours of its occurrence. According to Humphreys J. (at p. 703) the effect of the change was to render the offence one not requiring any proof of knowledge, leaving untouched the question whether proof of absence of knowledge on the part of the defendant affords in law a defence. The other members of the court invoked the words of Day J. in *Sherras* v. *De Rutzen*, Lord Goddard C.J., explaining (at p. 700) that the absence of the word "knowingly" *altered* the burden of proof, while Singleton J, said (at p. 704) the effect was to *shift* the burden of proof. Insomuch as both judges laid no stress on their choice between the words "alter" and "shift" it may be assumed that they were intended to convey the same meaning.

This view is borne out by reference to *Reynolds* v. *G. H. Austin & Sons, Ltd.* [1951] 2 K.B. 135, where Lord Goddard in elaborating on the meaning which he attributed to the passage from *Sherras* v. *De Rutzen* (*supra*) said that the absence of "knowingly" in the statute only *shifted* the onus of proof. He went on to say (at p. 145): "This affirms the principle that except in cases where the statute creates an offence of knowingly doing an act the prosecution can establish a prima facie case merely by proving the act was done.[3] Lack of knowledge must be proved by the defendant, as the burden of proving knowledge or the lack of it with respect to the act to be proved depends on the opportunities of knowledge which may be possessed by the respective parties":— for which proposition Lord Goddard referred to Stephen's *Digest of the Law of Evidence* (12th ed.) Art. 104.

When considering the accuracy of the rule as stated in *Sherras* v. *De Rutzen* and repeated in subsequent cases, the main difficulty arises in ascertaining in what sense the different judges used the expressions "*alter* the burden of proof" and "*shift* the burden of proof." There are, of course, two separate categories of burden

[3] As will be seen later, the Lord Chief Justice in *R.* v. *Cohen* [1951] 1 K.B. 505 disregarded this so-called exception.

of proof.[4] First, there is what has been conveniently described as the *legal* burden of proof [5] and which, in criminal cases (unless otherwise directed by statute) imposes upon the prosecution the duty of proving the accused guilty of the offence charged.[6] Instances of statutory provisions which are exceptions to the general rule occur in the Larceny Act, 1916, s. 28, the Explosives Substances Act, 1883, s. 4, the Merchandise Marks Act, 1887, s. 2, and the Immoral Traffic (Scotland) Act, 1902. Used in this first sense the burden of proof is fixed. It cannot be altered, neither does it shift during the course of the trial. Furthermore, the question whether or not the legal burden has been discharged does not arise until all the evidence, for the prosecution and for the defence, has been given.

Secondly, there is what has been called the *provisional* burden of proof.[7] Used in this sense the burden of proof rests on the party who, unless he is resigned to an adverse verdict, must either call further evidence or adduce arguments explaining away or rebutting an inference which the court may otherwise feel compelled to draw from the existing evidence. Admittedly difficult to pin down, and as often as not more apparent than real, burden of proof in this second sense is fluid and may shift to and fro during the course of the trial.

Turning now to *Roper* v. *Taylor's Central Garages Ltd.*, it seems clear that Devlin J. based his doubts as to the accuracy of the principle stated in *Sherras* v. *De Rutzen* on the understanding that Day J., and Lord Goddard in the later cases, were referring to the *legal* burden of proof. Accepting that, as an ordinary principle of the law of evidence, the statement from Stephen's *Digest* was correct, Devlin J. continued (at p. 288): "... but Mr. Justice Day seems to me to be going further than that, and to be saying that the absence of 'knowingly' in the statute *as a matter of construction* [8] shifts the burden of proof." After referring to statutes where the burden of proof is expressly shifted on to the defence, giving as an example the Merchandise Marks Act, 1887, Devlin J. went on to relate the presence or absence of the word "knowingly" to the requirement of *mens rea*. The learned judge added: "All that the word 'knowingly' does is to say expressly what is normally implied, and if the presumption that the statute requires *mens rea* is not rebutted I find difficulty in seeing how it can be said that the omission of the word 'knowingly' has, as

[4] As Viscount Sankey L.C. said in *Woolmington* v. *D.P.P.* [1935] A.C. 462, at p. 479: "The word 'onus' is used indifferently throughout the books, sometimes meaning the next move or next step in the process of proving or sometimes the conclusion of the whole matter."

[5] See 61 L.Q.R., p. 379.

[6] Finally established in *Woolmington's Case* [1935] A.C., at p. 481.

[7] See 61 L.Q.R., p. 380.

[8] My italics.

a matter of construction, the effect of shifting the burden of proof from the prosecution to the defence."

This criticism, it is suggested, rests entirely on the assumption that the rule, as stated, refers to the legal burden of proof. To say that the burden of proof is *altered* (see Brett J. in *Prince* and Lord Goddard in *Harding* v. *Price* (*supra*)) is certainly a pointer that such was the meaning intended. Added weight to this view is lent by reference to the judgment of the Lord Chief Justice in *R.* v. *Cohen* [1951] 1 K.B. 505 where the offence was knowingly harbouring uncustomed goods contrary to the Customs Consolidation Act, 1876, s. 186. Explaining the onus of proof in such a case, Lord Goddard said that where dutiable goods are found in the accused's house, that would establish a prima facie case that he knowingly harboured them.[9] By virtue of section 259 of the same statute the onus of proof is then on the accused to give some explanation of his possession from which a jury might infer that he did not know that duty had not been paid. Lord Goddard continued (at p. 507): "It must be for him to give this explanation because the facts relating thereto must be exclusively within his knowledge. There is, in fact, a shifting of the burden of proof." Used in this connection where, it should be noted, the burden of proof is placed on the defendant by express statutory provision, it is evident that the Lord Chief Justice was referring to the legal burden of proof. If reference is made to the language used by the court in relation to offences where the word "knowingly" is omitted—see, for example, *Reynolds* v. *Austin* (*supra*)—the similarity is evident. It is perhaps not without significance that Lord Goddard in both *Cohen* and *Reynolds* v. *Austin* relied for support on the same passage from Stephen's *Digest*.

This examination of the authorities points to the following conclusions:

(1) Where, as in *R.* v. *Cohen*, the legislature has required the defendant to discharge a certain onus of proof, any reference to the shifting of the burden of proof is concerned with the legal burden of proof.

(2) Where, as in *Reynolds* v. *Austin*, reference is made to the shifting of the burden of proof, if what was intended to be expressed was the shifting of the provisional burden, no occasion exists for criticism. But when it is seen that the language used is not materially different from that used in *R.* v. *Cohen* it is not surprising to find it interpreted as the shifting of the legal burden of proof.

(3) So far as the judgment of Day J. in *Sherras* v. *De Rutzen* or any other judgment is intended to lay down that the absence of the word "knowingly" in an offence ipso facto

[9] See note 3 above.

affects the legal burden of proof, it infringes the well-established rule that the legal burden of proving the guilt of the accused is upon the prosecution and cannot be altered except by *express* statutory provision. There is, therefore, no justification for the introduction or continued application of such a principle.

Such confusion as exists is due to the unfortunate failure of the judges to indicate which particular sense of burden of proof is intended. It is to be hoped that Devlin J.'s expression of doubt as to the accuracy of the rule as stated in *Sherras* v. *De Rutzen* will help in drawing attention to a practice which has nought to commend it.

Degrees of knowledge in Statutory Crimes

Adventurously, Devlin J. next proceeded to list the different degrees of knowledge which, in his opinion, are relevant to consider in statutory crimes involving proof of knowledge on the part of the accused. These degrees he defined as follows (at pp. 288–289):

(1) *Actual knowledge*: Where, because of the impossibility of proving the state of another man's mind, the defendant's knowledge is generally inferred from the nature of the act done.

(2) *Knowledge of the second degree*: Where the defendant has shut his eyes to an obvious means of knowledge. Alternatively, where the defendant deliberately refrains from making inquiries the result of which he does not care to have.

(3) *Constructive knowledge*: Where the defendant merely neglects to make such inquiries as a reasonable and prudent person would make.

According to Devlin J. there is a vast distinction between (2) and (3) above, "the case of shutting the eyes is actual knowledge in the eyes of the law; the case of merely neglecting to make inquiries is not knowledge at all—it comes within the legal conception of constructive knowledge, a conception which, generally speaking, has no place in the criminal law."

Classifications such as this do no harm provided they help to clarify and not to complicate the existing law which, so far as it relates to the Licensing Acts, is hardly satisfactory. To substitute "knowledge of the second degree" for what has consistently been described as "connivance" does not help in any way. On the contrary, by failing to explain that the same state of mind was involved, it merely serves to mislead by suggesting that an additional degree of knowledge, separate from connivance, will suffice. What is clear from the authorities is that a person who deliberately shuts his eyes to an obvious means of knowledge, has sufficient *mens rea* for an offence based on such words as "knowingly," "suffering" or "permitting." Thus, in *Redgate* v.

Haynes (1876) L.R. 1 Q.B. 89, where the charge was suffering gaming on licensed premises,[10] Blackburn J. said of the accused licensee: "... if she purposely abstained from ascertaining whether gaming was going on or not, or, in other words, connived at it, that would be enough to make her liable." Lush J. agreed with this proposition. A similar statement of the law is to be found in the judgment of Lord Coleridge C.J. in *Somerset* v. *Hart* (1884) 12 Q.B.D. 360, at p. 364, where he uses the phrase "wilful blindness" as interchangeable with connivance.

Again, Devlin J.'s use of the phrase "constructive knowledge" to describe the state of mind of a defendant who merely neglects to make inquiries and which, according to the learned judge, in general has no place in the criminal law, is something entirely new. Hitherto, constructive knowledge has been used to describe the state of mind embodied in the word "connivance," as, for example, in *Bosley* v. *Davies* (1875) L.R. 1 Q.B. 84 where Cockburn C.J. said (at p. 88) in relation to the offence of "suffering gaming": "Actual knowledge in the sense of seeing or hearing by the party charged is not necessary, but there must be some circumstances from which it may be inferred that he or his servants had connived at what was going on. Constructive knowledge will supply the place of actual knowledge." This passage was cited, with approval, by Manisty J. in *Bond* v. *Evans* (1888) 21 Q.B.D. 249, at p. 253.

Of greater importance, however, is the question whether a defendant who merely neglects to make inquiries should be considered as having sufficient knowledge in the eyes of the law. In practice it may well prove difficult to distinguish between "connivance" and "neglect," and this difficulty may have prompted Cockburn C.J. in *Bosley* v. *Davies* (*supra*) to state (at p. 87): "A man may be said to 'suffer' a thing to be done if it is done through his negligence," and Mathew J. in *Somerset* v. *Wade* [1894] 1 Q.B. 574 to declare: "... a licensed person cannot be convicted of suffering gaming in the absence of knowledge, or connivance or carelessness on his part." More recently, in *London Computator Ltd.* v. *Seymour* [1944] 2 All E.R. 11, the Divisional Court adopted a strict interpretation of the word "knows" in one of the Defence Regulations, holding that it bore its ordinary meaning and was not to be construed as "ought to have known."

Without a full examination of the cases it would be unwise to express any conclusions on the question; but this much may be said. The degree of knowledge necessary to be proved to establish criminal liability for a statutory offence is one of real practical importance. That there should still be uncertainty as to the correct position, and Devlin J.'s suggested classification makes those

[10] Formerly an offence under the Licensing Act, 1872, s. 17, it is now covered by the Licensing (Consolidation) Act, 1910, s. 79.

doubts more apparent than ever, is one more blot on our criminal law which needs to be investigated.

J. Ll. J. Edwards.

Common Mistake

In its recent judgment in *McRae* v. *Commonwealth Disposals Commission* [1] the High Court of Australia made a singularly significant contribution to the clarification of the common law principles relating to the vexed topic of " mistake " in contract which is the more noteworthy by being handed down at a time before the fire of controversy kindled by Denning L.J. in *Solle* v. *Butcher* [2] has subsided into dying embers. The fact situation bordered on the slightly fantastic. The Commission accepted a tender by the plaintiff for the purchase of a vessel which had been advertised as " an oil tanker on Jourmaund Reef approximately 100 miles north of Samarai " (New Guinea). There was not at any material time a ship answering that description lying near the location indicated, and it was found that, though fraud could not on the evidence be attributed to the defendants, they were guilty of the " grossest negligence," not having any reasonable ground for the belief that there was such a tanker in existence. They took no steps to verify their assertion, based solely on rumour, that they had a ship to sell, and any " mistake " that existed was induced by their own culpable neglect.

The principal question for decision was whether a valid contract had been made between the parties for breach of which the plaintiff was entitled to damages, at any rate in respect of expenses incurred in fitting out and embarking on a futile salvage expedition. This was contested in reliance on *Couturier* v. *Hastie* which is generally assumed to justify the proposition that " mutual," or rather " common," mistake relating to the existence (or identity) of the subject-matter nullifies consent and therewith *avoids* the agreement. Indeed section 7 of the Sale of Goods Act, 1893, represents a formulation of the *ratio decidendi* of that decision based on this supposition, providing as it does in categorical terms that " where there is a contract for the sale of specific goods, and the goods to the knowledge of the seller have perished at the time when the contract is made, the contract is *void*." This provision was, however, inapplicable to the present case because the goods had never been in existence.

At the trial Webb J. had accepted the defendants' contention that the agreement was void for mutual mistake, but this decision was reversed on the present appeal. The court, in its principal judgment delivered by Dixon and Fullagar JJ. and prepared by the

[1] Not yet fully reported; see 25 A.L.J. 425. The writer is indebted for a transcript to the Att.-Gen.'s Dept., Canberra.
[2] [1950] 1 K.B. 671.

latter, carefully re-examined *Couturier* v. *Hastie* and came to the conclusion that it does not support the proposition for which it is generally cited. In the first place, as the case was concerned with an action by the seller for the price of goods which he was unable to deliver, the issue was in no way dependent on a decision as to the validity of the contract. Indeed, the action would probably never have been brought, and certainly not reported, if there had not been the complicating factor that, on the construction of the contract, there was room for the argument that "the purchaser had bought the cargo if it existed at the date of the contract, but that, if it had been damaged or lost, he bought the benefit of the insurance but no more."[3] It was on this question that the Exchequer Chamber[4] and the House of Lords[5] differed from the majority of the court below[6] and restored the verdict for the defendants. Secondly, certain passages in the judgment by Coleridge J. in the Exchequer Chamber which seem at first reading to lend a semblance of support for the view that the contract was regarded as "invalid" or having "failed" appear, in their context, to mean no more than that the principal subject-matter of the contract was a cargo of corn and not shipping documents representing non-existing goods, that the *consideration* to the purchaser had *failed* and that he could not therefore be held liable to pay the purchase price. Similarly, in the other cases of this type-situation, like *Gompertz* v. *Bartlett*,[7] *Gurney* v. *Womersley*[8] and *Strickland* v. *Turner*[9] (with the exception of *Scott* v. *Coulson*[9a] where relief was granted on equitable grounds) the decision was simply that the purchaser could recover the money paid by him in an action for money had and received on the ground of failure of consideration. In none of these cases, therefore, was there an action by the buyer for damages for breach of contract in respect of loss suffered through non-delivery of the goods, so as to raise the crucial question whether the agreement was void or not. Had such a claim been advanced, the decision would have depended on a construction of the contract with a view to ascertaining whether both parties had intended the creation of contractual obligations to be subject to an implied condition precedent that the goods were actually in existence.[10]

It is conceived that the primary importance of the judgment under consideration lies in the assertion that prima facie there would be no such implied condition and that, quite to the contrary, the seller must normally be taken to have *promised* that the goods

[3] *per* Parke B., 8 Ex., at p. 55.
[4] 9 Ex. 102.
[5] 5 H.L.C. 673.
[6] 8 Ex. 40.
[7] (1853) 2 E. & B. 849.
[8] (1854) 4 E. & B. 133.
[9] (1852) 7 Ex. 208.
[9a] [1903] 1 Ch. 453; [1903] 2 Ch. 249.
[10] See also *Pollock on Contracts*, 12th ed., p. 294; not cited.

are in existence. This is supported by Martin B.'s direction to the jury and various expressions of view in the judgments of the higher courts in *Couturier* v. *Hastie*. This, it is submitted, is the only approach consistent with our theory of *assumpsit*; for, after all, is it not clear that, if A purports to sell goods to B, both erroneously believing them to belong to A when in truth they are the property of C, the seller will be bound by his promise? Has he not *promised* that they are his to sell? Reverting to the opinion of the High Court, there follows a passage which is worthy of quotation: "When once the common law had made up its mind that a promise supported by consideration ought to be performed, it was inevitable that the theorisings of the civilians about 'mistake' should mean little or nothing to it. On the other hand, the question whether a promisor was excused from performance by existing or supervening impossibility without fault on his part was a practical everyday question of which the common law has been vividly conscious. . . . But here too the common law has generally been true to its theory of simple contract, and it has always regarded the fundamental question as being:—'What did the promisor really promise?' Did he promise to perform his part at all events, or only subject to the mutually contemplated original or continued existence of a particular subject-matter?"

At this point, attention may conveniently be drawn to the *American Restatement* which—rightly, it is submitted—also eschews a formulation of the governing principle in terms of mistake derived from Romanistic reasoning, yet sides in favour of a presumption for the implication of such a term. (*Cf.* section 7, Sale of Goods Act, 1893.) Section 456 provides that, "except where a contrary intention is manifested, a promise imposes no duty if performance of the promise is impossible because of facts existing when the promise is made of which the promisor neither knows *nor has reason to know*." The present commentator confesses to a bias in favour of the High Court formulation, but it will be observed that the italicised qualification in the *Restatement* would no doubt have produced the same conclusion on the instant facts. The court indeed reached what on its chosen premise was, in the light of the circumstances, the inevitable decision that the contract as thus construed included a promise by the Disposals Commission that there was a tanker in the specified location, for the breach of which the plaintiff was entitled to damages.

The judgment, moreover, indicates that, if the view taken of *Couturier* v. *Hastie* was wrong, the present case nonetheless fell outside its ambit because the Commission could not rely on a mistake as avoiding the contract which had been induced by the culpable conduct of its servants who recklessly and without any reasonable ground asserted the existence of a tanker. "A party cannot rely on mutual mistake where that mistake consists of a belief which is, on the one hand, entertained by him without any

reasonable ground, and on the other, deliberately induced by him in the mind of the other party."

The comment may be hazarded that the present decision has vindicated to a substantial degree Denning L.J.'s analysis of earlier authorities in *Solle* v. *Butcher*. It was there said that " once a contract has been made, *i.e.*, once the parties, whatever their inmost state of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good unless it is set aside for breach of some condition expressed or implied in it. . . . Neither party can rely on his own mistake to say that it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake. *A fortiori* if the other party did not know of the mistake but shared it." [11] Quite evidently our courts are seeking an escape from the confusion caused by the unwary reliance on alien doctrine familiarised by Pothier which ill-assorted with the common law emphasis on the meaning of the *promise*. The way is becoming clearer towards explanation of the relevant principles in terms of construction and offer and acceptance rather than within the framework of an independent and spurious category of mistake.

J. G. Fleming.

Agency and Fraud

Armstrong v. *Strain* [1951] 1 T.L.R. 856 (Devlin J.) and [1952] 1 All E.R. 139 (C.A.), concerned the so-called " divided element " in fraud; that is, the situation where one agent innocently makes a false statement and the principal or another agent knows the true facts. In these circumstances the Court of Appeal in *London & County Freehold & Leasehold Properties, Ltd.* v. *Berkeley Property Trust* [1936] 2 All E.R. 1039 decided that the statement of the agent might be added to the knowledge of the principal or second agent so as to make the principal liable for deceit. Shortly afterwards Mr. Patrick Devlin (now Devlin J.), then a well-known Junior, wrote a learned article in the *Law Quarterly Review* (53 L.Q.R. 344) in which he subjected the decision to weighty criticism. In 1937, Atkinson J., obviously impressed by Mr. Devlin's arguments, attempted to distinguish the *Berkeley Property* decision by the time-honoured expedient of declaring that it was not necessary for the learned Lord Justices to have gone so far as they did and that they could not have meant it (*Anglo-Scottish Beet Corporation* v. *Spalding U.D.C.* [1937] 3 All E.R. 335). This, of course, was the best that he, in his judicial capacity, could do; Mr. Devlin, exercising on this occasion

[11] [1950] 1 K.B., at p. 692.

the prerogative of the academic writer, had been able roundly to declare the Court of Appeal to be wrong. However, both came to the same conclusion, namely, that the principal could not be guilty of fraud unless knowledge that the statement was being made and knowledge of its falsity were united in the same person; otherwise, two rights, as they said, could not make a wrong.

In *Armstrong* v. *Strain* the same point again came up for decision; as luck would have it before the recently elevated Devlin J. The facts concerned a firm of estate agents, Messrs. Strain, Uren & Co., consisting of Mr. Strain and Mr. Uren. The former, who had retired from active practice, owned a bungalow near Southend, an area notoriously prone to produce settlements because of the heavy clay sub-soil. Mr. Strain's bungalow had suffered severely from this scourge and had already been underpinned three times. In these circumstances he was understandably anxious to dispose of it, and he placed it in his partner's hands for sale. The latter arranged with another firm to co-operate and they introduced a Mr. and Mrs. Armstrong, who offered £2,400, which Strain accepted. Before a formal contract was signed a partner in the second firm, acting as surveyor for a building society, valued it for mortgage purposes at £2,000 and Mr. Uren described it to the plaintiffs as "in very nice condition." Both these agents knew of the last underpinning but not of the two earlier ones. The sale was completed and within a few months the bungalow collapsed completely and finally. The Armstrongs then sued all three for deceit.

Devlin J. acquitted both agents of any conscious falsehoods and decided that it was not proved that Strain had deliberately kept them in ignorance of the truth in the expectation that they would unwittingly make false statements. Nevertheless the case against the principal, Strain, appeared to be on all fours with that against the defendants in the *Berkeley Property Case* and the learned judge expressly and convincingly declared that it was not possible to distinguish it as Atkinson J. had sought to do. But the industry of counsel, and, one suspects, the retentive memory of his Lordship, unearthed another decision of the Court of Appeal, heard at the height of the war, in which the *Berkeley Case* was not cited, and in which a contrary decision appears to have been reached. This was *Gordon Hill Trust* v. *Segall* [1941] 2 All E.R. 379, which everyone seems to have overlooked—certainly it escaped the vigilance of the learned editor of the new edition of Bowstead's *Law of Agency*. Nevertheless there it was, and it enabled Devlin J. to declare that he was faced with two conflicting decisions of the Court of Appeal between which he had to choose in accordance with the rule in *Young* v. *Bristol Aeroplane, Ltd.* [1944] K.B. 718. It need hardly be said that he chose to follow the latter. His reasons are set out in a long and learned judgment

which bears a close resemblance to his *Law Quarterly* article, to which, as he says, "I was (not unnaturally) referred." Hence Mr. Strain escaped, and the unfortunate Armstrongs were left with the ruins of a bungalow, and the burden of a mortgage debt and costs. Their only consolation was an expression of judicial sympathy, coupled with a strong representation that it should be made part of the professional code of estate agents to advise applicants in like circumstances to seek independent professional advice.

At this stage the case was an amusing example of the strange twists occasionally taken by our system of *stare decisis*. Barristers who write law review articles must often dream of overruling an obnoxious decision of the Court of Appeal when they are elevated to the Woolsack, but hardly in their wildest imaginings can they foresee doing so as judges of first instance. That, however, is precisely what Devlin J. succeeded in doing.

Subsequently however the Armstrongs were enabled to take the case to the Court of Appeal (Singleton, Birkett and Romer L.JJ.) which unanimously upheld Devlin J.'s decision, although they saved face by denying that the decisions in *Segall's* and the present case were irreconcilable with the *Berkeley Case*. In their view Atkinson J.'s interpretation of the latter was to be preferred to that of Devlin J. who had been misled by "the somewhat nebulous way in which the judgments in the case are expressed" (*per* Singleton L.J. at p. 141).

The law is therefore declared to be, that a principal is not liable for fraud in respect of his agent's acts unless (a) he intends or knowingly permits the agent to make a false statement, or (b) his agent acting within the actual or apparent scope of his authority makes a statement with knowledge of its falsity or recklessly not caring whether it be true or false; in other words that no one can be held guilty of fraud unless either he or his agent has *mens rea*. No doubt it is right that the stigma of fraud should not lightly attach, but is the result now reached either socially desirable or logically satisfying? The argument adopted is that *no one* can be guilty of fraud unless *someone* has been fraudulent. But is this sound? Surely the logical (and, it may be, the desirable) rule is that no one should be branded as fraudulent unless he himself has been fraudulent. But this, admittedly, is not the rule in English law where it is well established that a principal is liable for the fraudulent acts of the agent acting within his ostensible authority. (*Barwick* v. *English Joint Stock Bank* (1866) L.R. 2 Ex. 259.) Moreover, it is admitted that the act of the agent in making the statement may be attributed to the principal and added to the principal's or another agent's *guilty* knowledge so as to constitute all the elements of actionable deceit. While the liability of the *agent* must obviously depend on whether he has guilty knowledge it is not so clear why the agent's guilt should be decisive as regards the liability of the

principal. Is it a fact that a principal is only liable if his agent has committed a tort actionable against the agent (*Smith* v. *Moss* [1940] 1 All E.R. 469 suggests the contrary)? And if so, how is this satisfied where one agent makes the statement and another has knowledge of the facts making it false and that it is being made? All the judgments agree that the principal is liable in such a case, but the first agent is clearly not, as he has no *mens rea*, and the second agent, it is suggested, is not liable either, as he has not done the *actus reus* (making the statement) and the first agent is not *his* agent. In other, and more authoritative, words, "For myself I cannot see why if the physical acts of several agents may collectively in law be the joint responsibility of the principal, the same principle should not apply to the states of mind" (*per* Slesser L.J. at [1936] 2 All E.R. 1047).

Two further points may be added. First, it is to be hoped that this decision will not provide companies with an unmerited loophole. This possibility was recognised by Singleton L.J. who suggested a possible solution: "Difficulties may arise in a claim against a company which can only speak or act through its agents or officers, but if an officer of a company writes and represents that which is untrue when many other officers of the company know the true facts, it may well be found that he made the representation without belief in its truth or that he made it recklessly, careless whether it was true or false" (at p. 141). Perhaps another safeguard might result from an extension of the principle that the governing body (the board of directors or the like) are not merely agents of the company but are its organs whose acts and states of mind may be regarded as those of the company itself; see, for example the well-known judgment of Haldane L.C. in *Lennards Carrying Co.* v. *Asiatic Petroleum* [1915] A.C. 705 at pp. 713-4, recently followed in another connection in *The Truculent* [1951] 2 All E.R. 968. From this it seems but a short step to a recognition that the acts and knowledge of the various members of the governing body have to be regarded collectively and that the company cannot escape liability for the misstatements of one managing director on the ground that he was ignorant of facts known to another.

Secondly, it is submitted that this decision is a further illustration of the fact that our law is far too strict in apparently denying any remedy, after completion, for misrepresentation in the absence of strict proof of fraud. In this connection it is interesting to note that the plaintiffs' legal advisers did not think it worth while even to plead for rescission on the ground of innocent misrepresentation. Having regard to the recent judicial criticisms of the rule in *Angel* v. *Jay* [1911] 1 K.B. 666 it seems regrettable that they did not put this point to the test. If ever there was a case where equity ought to have intervened this seems to be it.

L. C. B. Gower.

John Doe—A Footnote

In a former note (*ante*, p. 74) it was suggested that the legal advisers of those seeking to circumvent the Gaming Acts need not fear that they are committing contempt of court provided that they do not willingly attempt to mislead the court. It should be added that the Council of the Law Society has now expressed the opinion that "it is professionally improper to seek to obtain payment of such a debt (*scil.*: a gaming debt) by threatening the issue of process, or by issuing a writ, however the statement of claim may be drawn." (*The Law Society's Gazette*, 1952, p. 17.)

J. D. B. Mitchell.

When is a Lease not a Lease?

The decision in *Errington* v. *Errington* [1952] 1 All E.R. 149, presents features of unusual interest and importance. The facts were simple enough. In 1936 Mr. Errington, Senior, bought a house for his newly married son and daughter-in-law to live in. He paid £250 down and borrowed the remainder of the purchase-price, £500, from a building society on the security of the house. The loan was to be repaid with interest in weekly instalments. The house was in his name, and it was he who incurred the obligation to pay these instalments, and he told his daughter-in-law that the £250 was a present to her and her husband. At the same time he handed the building society book to her with the words: "Don't part with this book. The house will be your property when the mortgage is paid." Thenceforward the daughter-in-law paid the instalments as they fell due. In 1945 Mr. Errington, Senior, died and left the house by will to his widow. She was the plaintiff in the present action for possession of the house. Briefly the question to be decided was whether the defendant had or had not a right to remain in possession as a result of the transaction with her father-in-law just mentioned.

The county court judge held that the action failed. In his view the defendant and her husband had occupied the premises as tenants at will. At the end of thirteen years, therefore, the right of the landlord to sue for possession was statute-barred (Limitation Act, 1939, s. 9 (1)). None of the lords justices in the Court of Appeal agreed with this view, although they dismissed the appeal on other grounds. The essence of a tenancy at will, they held, is that it is terminable by either side at will. A promise such as the present one not to determine the tenancy makes it impossible for the promisor—here Mr. Errington, Senior—to eject the "tenants" (if tenants they be) so long as the instalments are duly paid (*per* Denning L.J. at pp. 153–4).

But having decided that the son and daughter-in-law were not tenants at will, it was necessary for the court to decide what was

their legal position. The period of their right to remain was a vague one of uncertain duration : so long as the instalments were duly paid and until they were all paid off. It is of the essence of a term of years that it should be for a fixed period (*Lace* v. *Chantler* [1944] K.B. 368). Nor was the defendant paying a rent. She was not bound to pay the instalments at all. Not being, then, either a tenant at will or a tenant for years, but having a right to remain in exclusive possession of the premises, what was the defendant's status? Their lordships were of the opinion that in these circumstances she was a licensee.

There is ample authority for the proposition that there can be no lease without a grant of exclusive possession. (*Wilson* v. *Travers* [1901] 1 Ch. 578, 581; *Taylor* v. *Caldwell* (1863) 3 B. & S. 826, 832, *per* Blackburn J.) This is not to say that whenever there is a grant of exclusive possession, there is necessarily a lease, rather than a licence. But Lawrance J. evidently thought pretty strongly that this was so for he said in *Lynes* v. *Snaith* [1899] 1 Q.B. 486: " the admissions state that she was in exclusive possession—a fact which is wholly inconsistent with her having been a mere licensee."

Amphlett B., however, had earlier contemplated a licensee who had exclusive occupation rights. He said, " it appears to be settled that a mere licensee is not liable to be rated, unless he has the sole and exclusive occupation " (*L. & N. W. Ry.* v. *Buckmaster* (1875) L.R. 10 Q.B. 444, 445). While exclusive occupation for rating purposes may possibly be different from exclusive possession for lease-or-licence purposes, it seems odd that this remark was not referred to in *Errington*. All the cases cited by Denning L.J. in support of his view that *Lynes* v. *Snaith* was wrongly decided are extremely modern. None is earlier than 1942, although he also mentioned a judgment by Lord Abinger C.B. in *Howard* v. *Shaw* (1841) 8 M. & W. 118, 122. This dealt with a purchaser occupying premises before completion. Lord Abinger thought that he could not be considered as a tenant. His brethren thought, however, that he was a tenant at will.

The modernity of these cases makes one wonder whether we are not in the presence of that exceptional phenomenon—a new right in land not created by statute. Denning L.J. tells us that " the difference between a tenancy and a licence is . . . that in a tenancy an interest passes in the land, whereas in a licence it does not." It is most respectfully suggested that this comes a little near to the *circulus inextricabilis* for if we ask what the consequence is of the difference between a lease and a licence we shall be told—as we were told by Vaughan C.J. in a case Denning L.J. himself quotes (*Thomas* v. *Sorrell* (1673) Vaugh. 330, 351)—that the consequence is that the licensee unlike the tenant acquires no interest in the land.

We must therefore consider what are the essential differences between a lease and an irrevocable licence exclusively to possess. That the licence in a case such as the present one is irrevocable

cannot really be doubted after the speeches in *Winter Garden Theatre* v. *Millennium Productions, Ltd.* [1948] A.C. 173. One obvious difference is that such a licence will not prevail against a bona fide purchaser for value of the legal estate. This must be so both on principle and under Law of Property Act, 1925, s. 1. But Denning L.J. himself assures us that such a licence will prevail against anyone else and not merely the contracting licensor (at p. 155). It is therefore apparently not a mere *jus in personam* but as much a *jus in rem* as any equitable interest in land. It was tempting to write " any *other* equitable interest," but we are told that the right of the licensee is not an interest in land (*per* Denning L.J. *cit. supra*). Here, then, is a person who has no interest in land but whose " contractual " right to exclusive possession will prevail against all comers save " equity's darling " in exactly the same way that an equitable interest in land would do. This recalls the remarkably similar development, whereby a restrictive covenant, originally actionable in equity on a contractual basis (*Tulk* v. *Moxhay* (1848) 2 Ph. 774), has now become to all practical intents and purposes an equitable easement, *i.e.*, an interest in the land (*Re Nisbet* and *Potts' Contract* [1906] 1 Ch. 386). This view may be traced back to 1882 (*London & S. W. Ry.* v. *Gomm*, 20 Ch.D. 562, 583, *per* Jessel M.R.).

A licence giving exclusive possession is not, it appears, an equitable lease, but it is remarkably like it in practical effect. It does not necessarily cease to be a licence and become a lease even if the licensee pays rent (*Marcroft Wagons, Ltd.* v. *Smith* [1951] 2 All E.R. 271). Nor do the words in which the parties have chosen to express their relationship necessarily indicate whether a lease or licence is created (*Booker* v. *Palmer* [1942] 2 All E.R. 674, *per* Lord Greene M.R. at p. 677). All that matters is whether they intended to create an interest in land or not. If " all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be a licensee " (*per* Denning L.J. at p. 155). Yet how many lay parties, we may wonder, stop to consider whether they are giving an interest in land or something which, while not theoretically an interest in land, gives the same practical result in an irrevocable right to exclusive possession? Can we imagine young Mrs. Errington asking her father-in-law, " Are you giving me an interest in the land or not? "

Denning L.J., however, gives us in passing, another possible test between leases and licences, when he says " they had a mere personal privilege to remain there, with no right to assign or sublet." Unless every lease with an absolute covenant against assigning or subletting—a common enough covenant—is not a lease but a licence, this test, it is respectfully suggested, is no more helpful than the others. Minor points of difference are that a lease with such a covenant may pass to the personal representatives or trustee in bankruptcy of the tenant. A licence presumably does not. It

seems, therefore, far from easy to draw the line between a lease and a licence. Yet somehow or other it must be done. The rent acts do not apply to a licence while they do to a lease (*Rogers* v. *Hyde* [1951] 2 K.B. 923). Presumably no note or memorandum in writing is necessary under section 40 or section 54 of the Law of Property Act, 1925, as no interest in land is created, on the creation of a licence. A licence to occupy a house rent-free for life differs in its effect from the ordinary tenancy at will, the former excluding the danger of the Limitation Acts (*Foster* v. *Robinson* [1950] 2 All E.R. 342). Yet these important practical consequences of the difference between a lease and a licence depend on the supposititious intent of the parties to create or not to create an interest in the land. The old test depending on whether exclusive possession was, or was not, given had at least the merit of clarity and definition. Is it really too late to return to it? If so, it is to be hoped that some real alternative test will be provided by the courts.

The new right of exclusive possession under an irrevocable licence has both advantages and disadvantages compared with a true lease :

1. It escapes the Rent Acts. Why should not landlords in future only grant licences and not leases? They could follow *Errington* in imposing no obligation on the licensee to pay a rent, but providing that if certain payments are not made, the licence shall come to an end. There would apparently be no equitable relief against such a forfeiture (*semble*, *per* Somervell L.J. at p. 152–3).
2. Assignment and sub-leasing are impossible. Few landlords would quarrel with that !
3. It does not prevail against a bona fide purchaser for value of the legal estate. Let the licensees worry ! Perhaps the turn of the landlords—now called licensors—has come at last.

C. d'O. Farran.

Factories Act, 1937, and its Regulations

Benn v. *Kamm* [1952] 1 T.L.R. 57 involved one of the more difficult legal problems arising out of the general scheme of the Factories Act, 1937, namely, the extent to which regulations made by the Secretary of State under section 60 (re-enacting substantially sections 79, 82 (1) and 83 of the Factory and Workshop Act, 1901) affect the duty to fence securely under section 14 (1) (section 10 of the earlier Act) and the duty to remove dust or fumes under section 47 (1) (section 74). It should be added parenthetically that, by section 159 of the 1937 Act, regulations made under the 1901 Act " . . . continue in force and . . . have effect as though . . . made or given under [the 1937] Act."

With the decision in *Benn* v. *Kamm*, it may be said that, up to the present, the relationships with which the courts have

had to contend have been those between section 14 (1) and the Woodworking Machinery Regulations, 1922, section 14 (1) and the Horizontal Milling Machines Regulations, 1928, and section 47 (1) and the Grinding of Metal (Miscellaneous Industries) Regulations, 1925. For this purpose, the substantial difference between sections 14 and 47 is that the former imposes an absolute ("shall be securely fenced") duty, the latter a qualified ("all practicable measures") duty; the points of distinction, for this purpose, among the Regulations are that the Milling Regulations contain a list of exemptions and the proviso "that these exemptions shall not prejudice the application of [section 14 of the Factories Act, 1937] in regard to fencing of such machinery," the Grinding Regulations contain exemptions but no saving proviso, whilst the Woodworking Regulations have neither exemptions nor proviso.

The Woodworking Regulations prescribe (inter alia) a certain form of fencing for circular saws. In *Miller* v. *Boothman* [1944] K.B. 337, a workman was injured in operating a circular saw, the fencing of which complied with the regulations but not with the absolute duty under section 14 (1). The Court of Appeal held that the regulations "modified" section 14 (1) by "substituting the prescribed guarding and fencing for the absolutely secure fencing which the section would otherwise require" (341). "The object of the legislature in giving power to the Secretary . . . to modify the . . . Act . . . would seem to be that it was recognised that there are some machines necessary for modern industry that cannot be completely fenced if they are to be used, and circular and band saws afford good illustrations" (340). The Court of Appeal in *Miller* v. *Boothman* nowhere suggested that the regulations had repealed section 14 (1) in regard to woodworking machines. "Modification" was the word emphasised. In *Nickolls* v. *Austin* [1945] K.B. 50, the employee, while operating a circular saw, was injured by a piece of wood flying back out of the machine, which was fenced in accordance with the regulations. The regulations did not provide for such a situation. The Court of Appeal held that, for woodworking purposes, the regulations had repealed and replaced section 14 (1). This, the court considered, was the ratio in *Miller's Case*. No statutory duty had, therefore, been broken by the employer. In affirming the Court of Appeal's order on other grounds, the House of Lords, [1946] A.C. 493, expressly and unanimously reserved *Miller's Case* (*semble*, as interpreted in *Nickolls*) for future consideration.

In *Franklin* v. *The Gramophone Co. Ltd.* [1948] 1 K.B. 542, the Court of Appeal adopted the same interpretation of *Miller's Case* as in *Nickolls*, though a sentence from the judgment of Scott L.J. (who sat also in *Miller's Case*) is noteworthy: "The decision . . . in *Miller* . . . was based upon nearly comparable considerations; and we then took the same kind of view, namely, that the particular provisions of the regulations then in question

were substituted for the general provisions, however unqualified the section of the Act, *at any rate to the extent of modifying one similarly absolute provision of the Act*" (552).[1] The situation in *Franklin* threw up a *casus omissus* of the Grinding Regulations. The dependants of the workman, who died of the dust he inhaled from nearby grinding wheels, succeeded on common law grounds because, the present line of cases has held, the Factories Act Regulations in no way affect the residual and supplementary common law duty of an employer to take care for the safety of his employees. Their claim for breach of statutory duty, on the other hand, failed because the regulations had, within the general scope of their subject-matter, repealed section 47 (1), so that the *casus omissus* was not the subject of statutory provision. The absence of a saving proviso to the exemptions list like that in the Milling Regulations clearly weighed with Somervell and—*semble*—Evershed L.JJ. (557, 560).

Benn v. *Kamm* dealt with the Milling Regulations. These provide (inter alia) for the fencing of the *cutters* of horizontal milling machines. The fencing of the machine in question complied with the regulations. Further, the machine did *not* fall within the list of exemptions set out in the regulations. Though it is difficult to visualise a machine of any complication from a purely verbal description, it seems plain from the judgment that the workman was injured, not by the cutters but by a different dangerous part of the machine, the danger from which, Parker J. found, might have been neutralised by fixing a practicable, precautionary device (59). However, the learned judge held, although "reluctantly" (61), that no action lay for breach of section 14 (1) of the Act on the ground that, in the light of the presence of a saving proviso to the exemptions only in the regulations and of the authority of *Miller* as well as *Franklin* and *Nickolls*, "the regulations were a self-contained code which was in complete substitution of the corresponding obligations under the Act" (61). The *casus omissus*, consequently, was not covered by any statutory provision. The common law claim failed on the evidence.[2]

From this line of cases, a number of conclusions and arguments emerge that seem worth stating:—

1. There is a certain logical inconsistensy in permitting the continued use of the qualified common law duty to afford a remedy in the teeth of a code of statutory rules described as "self-contained." Policy considerations, however, plainly require the existence of the possible remedy at common law. If the Regulations do in law form a self-contained code, it is self-contained within the legislative sphere alone.

[1] Italics added.
[2] The report in [1952] 1 All E.R. 56 is partially defective in that the fate of the common law claim is left unexplained.

2. When read in isolation, the exemptions list with the presence or absence of a saving proviso in the Milling and Grinding Regulations gives great force to the conclusions reached in *Benn* v. *Kamm* and *Franklin*. But the Woodworking Regulations, in which there is neither exemptions list nor proviso, may fairly be suggested as treatable within a different category. In neither *Miller* nor *Nickolls* was the *Franklin-Benn* point of construction taken. The judicial policy underlying the decision in *Miller* simply looked to the strongly empirical basis of industrial legislation and the need to secure practical arrangements in concrete, individual cases. If, as I have respectfully suggested, the Court of Appeal in *Nickolls* extended the ratio of *Miller* by misinterpretation, the resulting conflict [3] between Court of Appeal *rationes* leaves the point in issue open to the election of future courts both of first instance and appeal in relation to the Woodworking Regulations.

3. With regard to the Regulations, generally, the force of the exemptions list and saving proviso is greatly diminished when they are read, not in isolation, but in the combined beam of two additional and, I respectfully think, powerful factors. First, the Factories Act, 1937, s. 60 states that the Secretary may "modify or extend," not abolish or repeal the relevant provisions of the Act. The words "modify or extend" have, I would respectfully submit, been given a technical, unliteral meaning, though their literal meaning is, I respectfully think, clear.[4] If this be so, the judiciary has, in this regard, gratuitously enlarged the powers of the executive. Be that as it may, it is a long-established canon of statutory interpretation that where words have one of two possible meanings, the meaning should be chosen that harmonises with the general intention of the Act. The broad, general purpose of the Factories Act is so far as possible to avoid accidents to factory workers, so far as possible to secure their continued safety rather than provide them with the often empty consolation of monetary compensation, to prevent not merely to cure. The Act is, it is true, a penal statute in the sense that its observance is largely enforced by criminal sanctions against factory occupiers; and so due consideration must be given to the statement of Somervell L.J. in *Franklin* where the learned Lord Justice expressed his agreement (*ibid.*, 558) with what was said by Lord Simonds in *L. & N. E. R.* v. *Berriman* [1946] A.C., 313, regarding the restrictive interpretation of penal rules promulgated under the Railway Employment (Prevention of Accidents) Act, 1900. Against this view, however, may be set, for example, the recent statement of Lord Porter in *Harrison* v. *N. C. B.* [1951] 1 All E.R., 1107: "It was suggested . . . that the Coal Mines Act, 1911, is a measure imposing criminal liability,

[3] This argument is considerably weakened by what may be the *implied* view of the *ratio* in *Miller* taken by the House of Lords in *Nickolls*.

[4] *Cf.* Dr. C. K. Allen's note arising out of *Miller's Case* in *Law and Orders*, Appendix I.

and, therefore, should be interpreted as throwing no greater burden on the employer than its words compel. It has, however, to be remembered that this Act is also a remedial measure passed for the protection of the workman and must, therefore, be read so as to effect its object so far as the wording fairly and reasonably permits." It is to be hoped that when the relationship between the Factories Act and its Regulations comes before the House of Lords for final adjudication, the paramount purpose of this protective industrial legislation will be reaffirmed.

C. Grunfeld.

Safe System of Outside Work

Those who regretted the decision of the House of Lords in *London Graving Dock Co., Ltd.* v. *Horton* [1951] 2 All E.R. 1 with regard to the extent of the duty of an occupier towards invitees will no doubt welcome the recent decision of the Court of Appeal in *Christmas* v. *General Cleaning Contractors, Ltd. and Others* [1952] 1 All E.R. 39, because it shows that, despite the inability to recover from the invitor, the injured invitee may nevertheless be able to recover damages from his employer. If the decision of the Court of Appeal in this case is right, then it indicates a possible avenue of escape from the harsh results of the decision in *Horton's Case*. It may be debatable, however, whether it does not place too heavy a responsibility upon the employer.

The case concerned a window cleaner, employed by General Cleaning Contractors, Ltd., who was sent to clean the windows of the Caledonian Club. While cleaning one of them he fell twenty-nine feet into the basement below and was injured. He brought an action for damages against his employers and the club, and Jones J. held that both the contractors and the club were at fault, and awarded the plaintiff £3,500, the defendants to share the liability equally between them. Each defendant appealed.

The contractors had a standing contract to clean the windows of the club, and the plaintiff had frequently been one of the men sent to do this work. He was an experienced employee, who had been in the service of the firm for twenty years. The window out of which he fell was a tall window, with two sashes, in the library of the club. Although some of the windows elsewhere in the club had proved troublesome and defective, and had been the subject of complaints by the men, there had never been any trouble with the windows of the library. On the day of the accident the plaintiff had first cleaned all he could of the particular window from the inside. Then he got outside to do the rest. He threw up the bottom sash and left it slightly open, and stood on the sill, holding on to the bottom of the top sash with one hand as he cleaned the window with the other. When he pushed the top

sash up further, the bottom sash fell down and dislodged his hand from its grasp of the bottom of the top sash, and he lost his balance and fell. It was found as a fact by the trial judge that the weights in the window were not heavy enough properly to balance the sash.

Two questions had to be considered in the Court of Appeal, and Denning L.J., delivering the principal judgment, dealt with both very carefully. Hodson L.J. and Lloyd-Jacobs J. agreed with the conclusions he reached on both points. The two questions were : (1) Was the club negligent? (2) Were the employers in breach of a common law duty to their employee or negligent? [1]

The first question was answered in the negative, because the relationship of the club to the plaintiff was that of invitor and invitee, and it was considered that the window did not constitute an unusual danger to the window cleaner. As Denning L.J. explained, at p. 41, " windows, which are often quite serviceable for ordinary purposes, may yet have same minor defect, such as rusty screws or worn sash cords, or ill-balanced weights, making them unsuitable for window cleaners to put their trust in. Such defects are, for window cleaners, common, recognisable dangers of everyday experience and cannot be classed as ' unusual.' " The result was to reverse the decision of the trial judge holding the club liable. This part of the decision will be as welcome to householders and other occupiers of premises as the other part will be disliked by window-cleaning firms.

The second question concerned the plaintiff's claim against the employers. Although Denning L.J. was not very explicit as to the nature of this claim, Hodson L.J. states, at p. 42, that it was " on the grounds that either in breach of their duty to him they have failed to take reasonable care to provide a safe system of work or they were negligent so that he sustained injury." This claim was upheld, and the reason for this is given in Lord Justice Denning's judgment. Put briefly, it is this: since it was no part of the duty of the club to protect the employee of the window-cleaning firm from the dangers of the job, it must have been part of the duty of his employers to do so. " They are dangers against which window cleaners must provide their own safeguards." If we accept the position established by *Horton's Case*, and no doubt we must become reconciled to it, then, Denning L.J. argues, " it must follow that it is for the employer, who sends his men to the premises, to take reasonable care to see that the premises are safe for the men or else take proper steps to protect the men from the dangers to which he sends them."

The learned Lord Justice sweeps aside the decision in *Taylor* v. *Sims and Sims* [1942] 2 All E.R. 375, in which Lewis J. held that an employer who sent his men out to work on the premises of other people, over which he had no control, was under no responsibility

[1] This is the way the plaintiff formulated his claim. It was not criticised by the court. It is, however, submitted that this involves a tautology.

for the safety of those premises, and he considers that the duty lying on the employer which he outlined in the sentence quoted above may be implied from the observations of Lord Porter and Lord Normand in *Horton's Case, loc. cit.* p. 5 and p. 11. It is not easy to see how an employer can take care that premises not under his control are " safe for the men," and it is suggested that Lords Porter and Normand would be slightly surprised to find their judgments being regarded as implying the extensive liability here contended for. It is submitted that the decision of the Court of Appeal is more defensible on the narrower ground referred to in the second part of the sentence quoted, namely that it is the duty of the employer to " take proper steps to protect the men from the dangers to which he sends them," which in this context means that he should have provided a safe system of work. This view of the case is borne out by a passage in Lord Justice Denning's judgment at p. 42: " They should have laid out the work more carefully. One way would have been to do the cleaning from a ladder, instead of from a sill. Another way would have been to ask the householder to allow the firm to insert hooks into the brickwork so as to attach a safety belt." It also finds support from the judgment of Hodson L.J.

It may be that the suggestions which Denning L.J. made as to the methods whereby the employers could discharge the duty are impracticable. It was urged on behalf of the employers that they were, and that it is usual for men to clean such windows as these by standing on the sills. The only objection Denning L.J. could see to his suggestions was the extra expense involved, and this he dismissed as an invalid objection. There seems to be some conflict here between what is regarded as reasonable in law and what is regarded as reasonable in practice. Denning L.J. regards the usual methods as negligent, whereas the employers regard the " proper steps " he suggests they ought to take as uneconomic.

Finally, a reflection may be permitted as to the fate of the unlucky Mr. Horton. In the light of *Christmas's Case*, it would appear that his employer could have been sued with better prospect of success than the occupier of the ship for a breach of common law duty. The difficulty would have been to circumvent *Taylor* v. *Sims and Sims, loc. cit. supra*, and the decision of Hilbery J. in *Hodgson* v. *British Arc Welding Co., Ltd. and Others* [1946] 1 All E.R. 95. In the latter case it was held that employers who were sub-contractors were not liable to a workman who was injured when a staging erected by a third party, the main contractor and occupier, collapsed, because they were merely sub-contractors engaged to do specialist work, and were in no way responsible for the scaffolding, the provision of which was the responsibility of the main contractor. It will be remembered that Mr. Horton was employed by a sub-contractor in similar circumstances to these.

One is left wondering whether, now that the liability of main contractors who are occupiers has been limited by *Horton's Case*, the liability of sub-contractors who employed the invitee might in future be regarded as more extensive.

J. E. HALL WILLIAMS

REFLECTIONS ON BEST *v.* SAMUEL FOX, LTD.

IN affirming the decision of Croom-Johnson J. at first instance in *Best* v. *Samuel Fox, Ltd.*,[1] the Court of Appeal has rejected an opportunity of removing a ludicrous anomaly in the English law of torts.

It will be recalled that *Best's Case* involved the question (novel to English law [2]) whether a wife could claim damages, for interference with her consortium, from a defendant whose negligence had rendered her husband incapable of sexual intercourse with her.[3]

Whereas there has been little, if any, judicial or academic consideration in England of a wife's rights for negligent interference with her marital consortium, there is, in the United States, an overwhelming abundance of material on the question.[4] Moreover the Court of Appeal was referred to a recent American case with similar facts where, contrary to the weight of authority, the wife's claim was upheld.[5]

Nevertheless, having carefully examined the roots of tortious actions based on a loss of consortium and thus provided itself with a most effective historical strait-jacket, the court found it impossible to afford a twentieth century remedy for a twentieth century action. In short, *Best's Case* succinctly ". . . illustrates the turmoil excited in the . . . judicial mind by the conflict between ingrained tradition and new-lighted concepts of wide-eyed civilisation." [6]

The initial and crucial difficulty is in defining the nebulous term "consortium" and this task immediately places the inquirer in a thicket of verbal quibbles. There is no doubt that historically the term "consortium" was synonymous with "servitium." [7] The

[1] [1950] 2 All E.R. 798; affirmed [1951] 2 All E.R. 116 (C.A.).

[2] For a discussion of the novelty aspect of the case see Denis Lloyd, 29 Can. Bar Rev. 210.

[3] See earlier note in 14 M.L.R. 84.

[4] *e.g.*, J. E. Hannigan, "Damages Recoverable by Husband for Injuries to Wife" (1916) 16 Col.L.Rev. 122; E. Holbrook, "The Change in the Meaning of Consortium" (1923) 22 Mich.L.R., p. 1; J. Lippman, "The Breakdown of Consortium" (1930) 30 Col.L.Rev. 651; C. M. Draper, "A Wife's Right to Recover for Personal Injuries to Husband" (1933) 6 Rocky Mt.L.Rev. 66. Case notes in 9 N.Y.Univ.L.Q.R., p. 235, and 26 Har.L.R., p. 74.

[5] *Hitaffer* v. *Argonne Co.* (1950) 183 Fed. (2nd) 811; and see D. J. Conroy in (1951) 25 Tulane L.R. 293.

[6] Hannigan, *loc. cit.*, at p. 123.

[7] The master's right to the services of his servant generally arose from status not contract: see Lord Parker in *Admiralty Commissioners* v. *S.S. Amerika* [1917] A.C., at p. 45.

A father's right to sue the seducer of his daughter is firmly based on a master and servant relationship: Clerk & Lindsell, *Torts*, 10th ed., at p. 333.

husband's rights of action for criminal conversation, enticement, and for loss of consortium by the negligent act of a third person, were all based on the concept that the relationship of husband and wife paralleled that of master and servant.[8]

Thus in *Lumley* v. *Gye*,[9] Coleridge J. considered that ". . . a wife is not, as regards her husband, a free agent or separate person, . . . she is rather in the character of a servant." In 1861 Lord Wensleydale in *Lynch* v. *Knight* said,[10]

> " The relation of the husband to the wife is in most respects entirely dissimilar from that of the master to the servant, yet in one respect it has a similar character. The assistance of the wife in the conduct of the household of the husband, and in the education of his children, resembles the service of a hired domestic, tutor or governess. . . . *It is to the protection of such material interests that the law chiefly attends.*"

Consequently, while the courts never *completely* identified the husband and wife relationship with that of master and servant, the analogy was sufficiently close to ensure that the wife never acquired rights similar to the husband for interference with the consortium. In addition there was a procedural difficulty, in that, even assuming that the wife had had any such rights, she would have had to join her husband as plaintiff and he would be entitled to any damages recovered. In other instances equity intervened to avoid common law procedural obstacles placed in the way of a married woman.[11] The absence of any such intervention in connection with loss of consortium tends to suggest that at common law it was the absence of any rights rather than procedural difficulties which prevented a wife from recovering for interference with the marital consortium.[12]

The gradual emancipation of married women in all branches of law [13] necessitated a revolution in judicial thought against the old concept of the marriage relationship. Consortium had to be construed as being something more than servitium. Thus the term eventually has come to include other factors : *viz.*,

> " Companionship, love, affection, comfort, mutual services, sexual intercourse—all belong to the married state. Taken together they make up the consortium. . . ." [14]

[8] See Lipman, *loc. cit.*, at pp. 653 and 655, who states that the legal basis for the action of criminal conversation was that " the wife was considered the husband's servant, and anyone who interfered with the right of a master to the services of his servant was liable to him in damages. Therefore the lover who interfered with this service was made to pay. Moreover, the wife was her husband's chattel, at least for the purposes of pleading, and so the action was in trespass."

[9] 2 E. & B. 216, at p. 249.

[10] (1861) 9 H.L.C. 577, at p. 598 (my italics).

[11] *e.g.*, the wife's equity to a settlement. See *Snell's Equity*, 23rd ed., at pp. 403 *et seq.*

[12] See Holbrook, *loc. cit.*, at p. 3.

[13] As manifested by the Married Women's Property Acts, 1870–1882, superseded by Part 1 of the Law Reform (Married Women and Tortfeasors) Act, 1935.

[14] Birkett L.J. in *Best* v. *Samuel Fox, Ltd.*, C.A., at p. 125.

N.B.—Prosser, *Torts* (1941), at p. 916, etc.: " There has been a gradual

Equipped with such definitions, the courts have been able to extend to the wife those remedies for interference with the marital consortium which were formerly only available to the husband.

Such remedies fall into two classes, dependent on whether or not the interference was intentional (*i.e.*, wilful) or unintentional (*i.e.*, negligent).

Where the interference is intentional, either spouse may now claim damages in tort for enticement,[15] an action first made available to the wife in 1923.[16] Similarly most American states which retain the old English action in tort for "criminal conversation" have extended the remedy to the wife.[16a] In comparison, in England, where the action was replaced by one for damages in the Divorce Division of the High Court,[17] no similar extension has ever been made to enable a wife to recover damages against the adulteress. This is yet another historical anomaly without logical justification in the current law.

On the other hand, if the interference is unintentional (*i.e.*, negligent), then English and American law have long recognised the husband's right to sue for loss of consortium [18] but the wife has, with the exception of the *Hitaffer Case*,[19] been denied an equivalent remedy. This anomaly has been soundly criticised by many leading authorities in the United States.[20] The reason for the present position has been thus stated [21]:

> "At Common Law the wife was never entitled to the services of her husband nor is she entitled to them by statute today. She had the right to all the other incidents of the marital relation equally with her husband, and it is generally settled that she can sue for direct, intentional attacks upon the marital

shift of emphasis away from 'services' and towards a recognition of more intangible elements in the domestic relations, such as companionship and affection. . . . The husband's interest in his relation with his wife first received recognition as a matter of her services to him as a servant. Over a period of some centuries it took form as something considerably broader than this, which was given the name of consortium."

15 The equivalent American tort is called "Alienation of Affections" but like "enticement" in English law, is based on loss of services. There is, of course, no need to prove adultery in an enticement action, *Elliott* v. *Albert* [1934] 1 K.B. 650.

16 *Gray* v. *Gee*, 39 T.L.R. 429.

16a *e.g.*, *Oppenheim* v. *Kridel* (1923) 236 N.Y. 156. But American State Legislatures have tended to abolish actions by *either* spouse for criminal conversations and alienation of affections—commonly termed "*heart balm*" actions.

17 Matrimonial Causes Act, 1857, ss. 33 and 59.

18 *Brockbank* v. *Whitehaven Ry.* (1862) 7 H. & N. 834.

19 Note 5, *supra*.

20 (*Inter alios*) Prosser, *loc. cit.*, at p. 948—a passage cited *in extenso* by Clark J. in the *Hitaffer Case*; Harper, *Law of Torts*, 1933, p. 566. Amongst English textbook writers on torts, Winfield, *Law of Tort*, 5th ed., 1950, does not mention the anomaly; Salmond (ed. Stallybrass), *Law of Torts*, 10th ed., 1945, pp. 368–369, states: ". . . there seems no sufficient reason why at the present day such an action should not lie." Clerk & Lindsell, *Torts*, 10th ed., 1947, p. 340, makes a scanty reference to the question. N.B. also N. S. Marsh in 67 L.Q.R. 37, at p. 41, who concludes that Mrs. Best ". . . had a strong case in law, the force of which was not fully appreciated by the trial judge."

21 I.E.I. (case-note) 9 N.Y.Univ.L.Q.Rev., at p. 236 (my italics).

> relations, such as for . . . the alienation of her husband's affection (*i.e.*, enticement). But where the marital relation is only indirectly affected by physical injury to a spouse, *loss of services and not impairment of the marital relation is the gist of the action in suits for loss of consortium.*"

To alter the present state of the law one of two methods could be adopted. Either the husband's existing right of action for loss of consortium due to the negligent injury of his wife by a third party should be abolished or a similar right of action should be given to the wife when her husband is so injured.[22] The first method has been adopted in some American states, but there is little to commend this course to English law. In most of such cases the loss of consortium by one spouse through injury to the other causes substantial hardship which is not sufficiently compensated by damages paid to the spouse actually injured. The concrete instance of Mrs. Best is a very striking example of such suffering.

The appeal from the decision of Croom-Johnson J. in *Best's Case* was largely argued on the single point (not pressed at first instance) as to whether or not the wife had a right of action for unintentional interference with the marital consortium through the defendant's negligence to her husband.

The Court of Appeal (Birkett L.J., Cohen L.J. as he then was, and Lord Asquith of Bishopstone) unanimously agreed that the denial of the wife's right was an historical anomaly and Birkett L.J. went so far as to say that

> ". . . today the rights of husband and wife in the consortium are fully mutual and completely equal, and, before the law, the wife is entitled to bring an action when she has been deprived of her consortium by the negligent act of a third person " (*loc. cit.*, p. 124).

Cohen L.J., while agreeing that the law was anomalous, thought

> ". . . it would be an extension of a line of decisions, in itself anomalous, if we were, in such cases as the present, to recognise a right of action in a wife corresponding to that which the courts have recognised as vested in a husband " (p. 126).

Finally, Lord Asquith adopted a strictly conservative and, with respect, an historically accurate view of the law, *viz.*,

> " . . . the husband's right being deeply entrenched in authority and the wife's never having been affirmed, I think that the intervention of the legislature would be needed to produce equity either by abolishing the husband's cause of action or by retaining it and conferring a similar cause of action on the wife " (p. 127).

Thus of the three learned judges, only Birkett L.J. was quite satisfied that the wife, like her husband, *has* a right of action for negligent interference with the consortium. Even so, he found that the wife could not sue in this case since she had only suffered a

[22] In the Court of Appeal in *Best's Case* (*loc. cit.*, at p. 127) Lord Asquith said this was a matter for the legislature.

partial as distinct from a *total* loss of consortium. Mrs. Best complained that the defendant's negligent injury of her husband had deprived her of ever having sexual intercourse with him—but sexual intercourse is only one aspect of the comprehensive term " consortium "—" companionship, love, affection, comfort, mutual services " would continue and ". . . the loss of one element, however grievous it may be . . . (cannot) be regarded as the loss of the consortium within the meaning of the decided cases. . . . Consortium is one and indivisible. The law gives a remedy for its loss, but for nothing short of that " (p. 125).

Likewise Cohen L.J. distinguished between ". . . loss, as distinct from impairment, of that consortium " (p. 125) and Lord Asquith stated, " Consortium is . . . one and indiscerptible. The alternative view, the view that you can disengage a particular strand in the consortial bond and say that, because that strand has been severed, that is enough . . . finds no support in the precedents and leads to insoluble problems in practice " (p. 127).

It is submitted, with respect, that this interpretation of " loss " of consortium is indefensible. As we have seen, the term began its variegated career meaning nothing more than " servitium " and the other strands were added later when the courts began to elaborate on the earlier crude conception of the marriage bond. It is true that the older cases never suggest that an impairment, as distinct from a loss, of consortium would suffice to found the husband's action. On the other hand, at the period when consortium was only considered to consist of one strand, *i.e.*, services, the question of partial loss would not present itself in such an acute form.

The American authority Prosser, after describing the gradual growth of the meaning of consortium and stating that in modern law it includes services, society, sexual intercourse and conjugal affection,[23] concludes [24]

> " The rights of the husband extend to all four; and while it is seldom that the defendant's conduct interferes with only one of them, it now seems clear in nearly all jurisdictions that such *interference with any one will be sufficient as a foundation for the action.* The loss of services, essential at the beginning, no longer is indispensable, and is now only one element upon which the action may be based."

It is submitted therefore that there is no reason why the English courts should adopt this " all or nothing " attitude in such actions.

Lord Asquith also suggested that to allow actions for partial loss of consortium would lead to insoluble problems in practice (p. 127). We would respectfully point out that the courts have not avoided such difficult questions as the assessment of damages to be paid for loss of expectation of life under the Law Reform (Miscellaneous

[23] *cf.* Birkett L.J. in *Best's Case*, cited *supra*, note 14.
[24] *loc. cit.*, at p. 917 (my italics).

Provisions) Act, 1934, and the apportionment of damages under the Law Reform (Contributory Negligence) Act, 1945. Surely the valuation of any particular strand of the consortium, while presenting difficulties, is not a matter to be shirked by a modern court.

In an earlier note on *Best's Case*, it was suggested that the Court of Appeal might provide a remedy where none had previously existed. It is regrettable that the Court of Appeal was not as bold as Darling J. who, in 1923,[25] took a firm step forward and granted the wife a remedy against the enticer of her husband. Lord Asquith saw fit to leave to the legislature the simple task of extending to the wife a similar remedy where the interference is unintentional.

It is to be hoped that the matter will appear high on the agenda of a resuscitated Law Revision Committee for,

> "Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife, that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity."[26]

Eric C. E. Todd.

[25] *loc. cit.*, *supra*, note 16.
[26] Cardozo, "The Growth of Law," at p. 66.

REVIEWS

THE QUEST OF JUSTICE. By HAROLD POTTER LL.D. [London: Sweet & Maxwell. 1951. 88 pp. 12s. 6d.]

WHETHER or not one agrees with the views expressed in this small but important book, one must rejoice that they have appeared in print. In an all too literal sense they are Professor Potter's last word on English law, for they are based on three public lectures which he gave in King's College, London, in the Lent Term, 1951, and to which he subsequently made additions, and in the Autumn Term of the same year they were published posthumously. As lectures they represented the realisation of an ambition of many years, and in them may be found a consummation of wisdom drawing its strength from practical experience, from the history of English law and above all from the Christian faith.

Professor Potter took for his theme the very great question of the nature of justice, its relation to law and the means by which it could best be secured. These questions he considers both historically and philosophically. Historically he investigates the quest of justice in four periods of English law which he aptly names the Dawn of Justice (twelfth and thirteenth centuries), the Age of Faith (fifteenth and sixteenth centuries), the Age of Reason (eighteenth century), and the Age of Hope (nineteenth to twentieth centuries). The emphasis in the earliest period on the need for procedural rules for the securing of justice teaches a lesson which is repeated up to the present time. If the Star Chamber in the Age of Faith sought truth through expediency by abandoning accusatorial procedure for its own inquisitorial methods and thus encompassed its own dissolution, the Court of Chancery saved itself in the Commonwealth period by creating a framework of procedure within which its justice was administered. From these various experiments in human justice the author draws what he calls perhaps the greatest lesson, namely, that "try as men may they cannot escape from human fallibility in framing procedure and that, consequently, no matter how perfect the rules of substantive law, injustice will follow in a greater or less degree" (p. 26). Of procedure it can at least be said that it safeguards no less than it hinders the administration of justice.

Justice for Harold Potter meant moral justice and was an absolute conception and one aspect of truth. With the best will in the world, accordingly, one can no more easily attain to the one than the other, but the aim of law and its procedure should be to draw as near as is possible in the nature of things to moral justice, "Passing legal judgment in the course of human activity," the author observed (p. 74, note (*r*)) "often essential to the community, must be distinguished from passing moral judgment."

The author's comments on administrative law, in which he had played an active part for a number of years as Chairman of a Wages Board, are of great interest (pp. 81–86). In them he makes suggestions for delimiting matters of expert opinion and policy from matters of law. His individual recommendations deserve the attention of everyone interested in administrative law.

Harold Potter would be the last person to admit that he was a Natural Law lawyer, but in the brilliant sketch that he has given us in his book he is, in fact, relating law and legal justice to an absolute and extra-legal ethical standard. Nowhere can one find so happy a synthesis of historical jurisprudence and a philosophy of law applied to some of the problems of a modern society. There are, of course, matters which are not likely to receive

general assent, but for reasons which appear in the prefatory note to this book, the reviewer must leave it to others to discover them. Here is a book that every lawyer would do well to read, for never has the author written so well or with deeper significance. *The Quest of Justice* is an epitaph of which he may be proud.

R. H. G.

Trade Union Law. By Norman Arthur Citrine ll.b.(Lond.), Solicitor of the Supreme Court. [London: Stevens & Sons. 1950. xliv and 700 pp. 45s. net.]

The book on *Trade Union Law* which Sir Henry Slesser and the late Mr. Charles Baker first published in 1921 was to some extent a pioneer and became the standard work on the subject. While attempting, on the basis of the learned authors' great experience, to give the legal practitioner and the trade union official practical guidance, it had to contend with such difficult legal problems as the ambiguous intermediate position which trade unions held between the individual and the corporation, the pervading common law doctrines of conspiracy and restraint of trade, and the confusing mass of judicial decisions and piecemeal interventions of the legislature. The third edition of *Slesser and Baker*, which took account of the Trade Disputes and Trade Unions Act, 1927, and the decisions in *Sorrell* v. *Smith* (1928) and *Ware and de Freville* v. *The Motor Trade Association* (1921), came out as far back as 1927 and has long been out of print. It was very helpful as far as it went, but it was far from exhaustive, somewhat cryptic and not easy to read, and it had become dangerously out of date. At the end of the war Mr. N. A. Citrine, legal adviser to the Trades Union Congress, embarked on a new edition of *Slesser and Baker*, but his extensive researches and the lapse of time since the issue of the last edition gradually resulted—with the approval of Sir Henry Slesser and the commendation of the then Lord Chancellor, Lord Jowitt—in the writing of an entirely new work. While paying due respect to the memory of the pioneer, we welcome Mr. Citrine's new book both on general principle and because we think it is a great improvement on the old. Its publication, too, marks a further stage in the history of this branch of law, following the enactment of the Trade Disputes and Trade Unions Act, 1946, important judicial decisions on the common law of conspiracy and interference with trade led by that of the House of Lords in *Crofter Hand Woven Harris Tweed Co.* v. *Veitch* (1942), and further statutory interpretations by the courts and the Chief Registrar of Friendly Societies.

In writing this book Mr. Citrine has borne in mind the needs of the professional adviser, the trade union officer and the student. The bulk of the book, which is much fuller and more readable than its predecessor, retains the form of a commentary on the Trade Union Acts, Part II dealing with status and contract and Part III with liability in crime and tort. The experienced reader may turn directly to these passages in the confident expectation that he will be referred to all the relevant authorities and guided towards a sound solution of his problem, even if the learned author does tend to lean in favour of trade unions on points where the law is admittedly doubtful. The discussion of such thorny topics as the legality of general strikes and the dicta in *Linaker* v. *Pilcher* (1901) are thorough, and the book will bear the scrutiny of tests on points of such practical importance as the circumstances in which a declaration or injunction may be sought against a trade union that commits or threatens to commit a breach of its unenforceable rules, and the power of a union to expel or fine its members. The Appendices contain full extracts from all the relevant statutes as amended, regulations, forms, rules of court, and matters usually provided for in trade union rules.

Since the book was published the Conditions of Employment and National Arbitration Order, 1940—under which the National Arbitration Tribunal was constituted—has been revoked by the Industrial Disputes Order, 1951, under which the new Industrial Disputes Tribunal was formed. The Table of Cases includes a number of decisions of the Chief Registrar of Friendly Societies; and in the text a convenient distinction is made between references in light type to footnotes containing merely law reports and statutes, and references in heavy type to footnotes that contain reading matter of importance.

It is not the author's fault that the actual state of affairs is not always so orderly as the reading of his book might suggest. Registered trade unions do in fact with apparent immunity alter their rules unconstitutionally, neglect to register alterations of rules, fail to supply up-to-date copies of their rules, and impose fines on members contrary to their rules. The sanction against even a justifiably recalcitrant member is the threat on the part of his mates to strike, with the knowledge that the employer (against whom the strike is not directed) will regretfully dismiss the recalcitrant member (often a too zealous worker) rather than suffer a large-scale dispute and the consequent loss of production.

The method of compiling the main part of the book (following an introduction on history and principles) as a commentary on the statutes may well appeal to practitioners, but it assumes or implies that the statutes form a more or less complete and coherent code. This assumption, as the learned author himself is well aware, is not well founded, and the implication may be misleading. We intend no disparagement of the merit of this very useful book when we say that there is still room, as there has long been the need, for a really scientific treatise on trade union law.

O. Hood Phillips.

Modern Constitutions. By K. C. Wheare. [Home University Library. Oxford University Press. 1951. vii and 216 pp. 6s. net.]

This is not a history but a work of analysis based on a comparative study of modern "written" constitutions. The field is, of course, far too wide for exhaustive treatment in a short volume and Professor Wheare uses his material with judicious selection for illustrative purposes. What he has given us is, however, something far more valuable than a mere formal analysis and classification of paper provisions. His single chapter on the classification of constitutions rightly claims that the attempt to classify a constitution is useful mainly as a preliminary to the study of its actual working, and the greater part of his book is devoted to consideration of such questions as: what a constitution should contain; the authority, legal and moral, of a constitution; the primary forces which affect constitutional development and modification; and the methods of formal amendment, judicial interpretation, and usage and convention, by which a constitution may be openly or covertly changed. These chapters are not only full of information but contain much acute legal and social analysis and many wise and temperate observations *de jure condendo*. *Modern Constitutions* is both an admirably lucid introductory book for the young student and the general reader, and also a work in which the expert will find much material for reflection. Its value for the beginner is enhanced by a Select Bibliography. Those who wish to keep it as a work for reference, however, will find the Index, though full, uncomfortably terse. The entry "Switzerland, constitution of," for example, is followed by 26- and the entry "United States, constitution of," by 38 page references without further specification of the points treated in each place. Until one knows the book almost by heart this is apt to waste time.

A. H. Campbell.

The Commonwealth in Asia. By Sir Ivor Jennings q.c., Vice-Chancellor, University of Ceylon. Being the Waynflete Lectures delivered in the College of St. Mary Magdalen, Oxford, 1949. [Oxford : At the Clarendon Press. 1951. 10s. 6d. net.]

A volume of lectures on Commonwealth affairs will not ordinarily arouse great expectations; a published lecture is too often disappointingly slight and literature on the Commonwealth exasperatingly trite. But no one would expect Sir Ivor Jennings to be content with the tantalising generalisation or the conventional platitude; and his Waynflete Lectures for 1949 on *The Commonwealth in Asia* are indeed of absorbing interest. They make one of the most informative and penetrating books that have been published on Commonwealth affairs since the War.

The lectures, which deal with India, Pakistan and Ceylon, fall into two groups. The first four lectures analyse the elements of diversity in matters of race, language, caste, religion, class and education. Those who have had direct experience of the countries discussed may wish to challenge some of Sir Ivor's opinions; one who is without such experience can say that he found these lectures to be fascinating reading. The last four lectures are devoted to matters of government. The problem of operating a system of responsible government in societies dominated by communalism is examined; the author, disclaiming the gift of prophecy, makes no optimistic forecasts. There follow lectures on the new constitutions of Ceylon and India. As a founding godfather, Sir Ivor has written more fully on Ceylon elsewhere, but what he has to say on India is of particular interest to constitutional lawyers. Finally, he considers the relationships of India, Pakistan and Ceylon with one another, and of each with the Commonwealth in which they have decided, for the time being at least, to remain. Here again he eschews facile optimism in probing the sources of anti-Commonwealth sentiment. The new Commonwealth differs significantly from the old, and politicians who still think in terms of its formal unity would do well to attend to Sir Ivor's view that if the Commonwealth had a foreign policy "it is certain that none of the three countries would be willing to share it." Hardly anything in this lecture is outdated, though it would have been interesting to have some reference to the early reactions of informed opinion in the three countries to the possible consequences of United Kingdom participation in closely knit regional organisations of the West.

S. A. de Smith.

Negligence in the Civil Law. By F. H. Lawson d.c.l., of Gray's Inn, Barrister-at-Law, Professor of Comparative Law in the University of Oxford. [Oxford : Clarendon Press. 1950. 341 pp. 25s.]

The most promising trend in English juristic thought at the present day is the study of law by the comparative method, with one eye on legal reform. Comparative legal studies fill the gap left by the decline of the historical school, which has lost its impetus. One of the most significant products of this new school of Comparative Law is the book under review. With presumption perhaps, but with conviction certainly, we congratulate Professor Lawson on putting this admirable tool at the disposal of teachers and students, the University of Oxford on providing him with an appropriate chair, and the Clarendon Press on furnishing an excellent production at reasonable cost.

We may see how views on the purpose of the study of Roman Law in this country have shifted their emphasis by comparing the Preface of this book

with that of Grueber's *Lex Aquilia.* Grueber, writing in 1886, tells us: "The Board of the Faculty of Law in the University of Oxford, being convinced that a more thorough knowledge of Roman Law may be the best means of advancing a scientific understanding and culture of English Law, has recently encouraged candidates in the Final School of Jurisprudence to exhibit a knowledge of some portion of the Digest, and has selected for that purpose the title 'Ad legem Aquiliam' . . ." Professor Lawson says: "this book has been compiled with the same intention as Professor de Zulueta's *Roman Law of Sale,* namely, that of introducing the student, through a detailed study of the Roman Law on a particular topic, 'to a general familiarity with the basic conceptions of most Continental systems, such as an educated English lawyer ought to possess.'" The scope of Professor Lawson's book differs considerably, of course, from Grueber's, for on the one hand "Negligence in the Civil Law" is not confined to Roman Law or damage to property, while on the other hand it is ostensibly confined to negligence. Professor Lawson has, however, generously though reluctantly compromised to the extent of including the whole of the text of Digest IX. 2, on the *Lex Aquilia,* with translation and commentary by way of footnotes, as it is still the practice in some universities to set the whole of a title of the Digest for study. Our students have already found it helpful for this purpose. Acknowledgments are made to previous editors, such as Pernice, Grueber, Monro and Thayer. Although the treatment of Professor Lawson's book differs in several respects from that of Professor de Zulueta's *Roman Law of Sale* (Oxford, 1945), it forms a companion volume to that rather than to Professor Jolowicz's Digest XLVII. 2, *De Furtis* (Cambridge, 1940), which keeps more closely to Roman Law sources.

In addition to Digest IX. 2, with Professor Lawson's illuminating notes, we are given extracts from the other relevant Roman texts, including the Institutes of Gaius and Justinian, other titles of the Digest, *Mosaicarum et Romanarum Legum Collatio,* the Code and the Basilica. Then follow selections from modern codes. As the space devoted to delict in most Continental codes is small, the learned author has been able to include passages from several codes. In any case he would not have thought it sufficient for his purpose to confine himself to the few articles of the French Civil Code, which, though a necessary foundation for the modern law, gives no picture of its present state. Further, as he says, it is interesting to trace the development of doctrine through representative codes of the nineteenth and twentieth centuries. He gives us extracts from the Prussian Code of 1794–1900, which graded negligence in three degrees; the eight relevant articles of the French Civil Code; five sections from the Austrian Civil Code of 1811; a passage on the *Lex Aquilia* and its extensions from Windscheid's *Lehrbuch des Pandektenrechts,* "the finest product of the Pandecktist school," virtually in the form of a code, which shows what use could be made of pure Roman Law in the nineteenth century; selections from the German Civil Code, the revised Swiss Code of Obligations, and the Soviet Civil Code of 1922 as amended to 1948; extracts from the eclectic Mexican Civil Code, to show the goal to which certain modern developments seem to tend; the Swiss Motor Law of 1932; and the Italian Civil Code of 1942, the most up-to-date legislative treatment of responsibility as a whole. The care with which this compilation has been made is illustrated by the fact that the extracts from the Soviet Civil Code, and the references to Soviet Law in the introduction, cover the main points discussed at pp. 359–363 of the third volume of Arminjon, Nolde & Wolff, *Traité de Droit Comparé,* which has since appeared. Texts in the French language have been left untranslated on the assumption that modern law cannot be studied comparatively without some knowledge of French. Difficult terms and phrases, however, are explained in footnotes. Passages from all other languages are accompanied by a translation on the same or the opposite page. Exceptions to this practice are that we are not

given the original of the Prussian Civil Code as it is no longer in force, nor of the Soviet Civil Code: on the other hand the English version of the Quebec Civil Code of 1865 is included as it is of equal authority with the French version.

Case law, as Professor Lawson points out, has been the decisive factor in developing the modern French law of civil responsibility, for the *Code Civil* does not clearly indicate the important boundary between strict liability and liability for fault. He therefore gives us extensive extracts, amounting to 70 pages, from recent French case law, together with the "notes" printed with the reports. He also gives extracts from Professor Paul Esmein's Volume 6 of Planiol et Ripert's *Traité pratique de Droit civil,* which is now out of print; but he has not included extracts from current French treatises, as they should be accessible in a good law library. These extracts are preceded by a lucid account of the structure and procedure of the French civil courts, the form of a French report and the authority attaching to *jurisprudence.* On this last topic the English reader with preconceptions about French law is warned that there has been considerable development in recent years. Thus "we are told that the *Chambre Civile* of the *Cour de Cassation* hardly ever departs from its decisions, at any rate directly. . . . One gets the impression that a decision even of a *Chambre Civile* has almost the authority of the House of Lords." The position of *doctrine* is summarised thus: "the opinions of the jurists, at any rate if they are in agreement, make law, though like the decisions of inferior courts they may easily be overruled by reference to higher authority. In other words *doctrine* ought to, and commonly does, run ahead of *jurisprudence* instead of, as is usually the case in England, behind."

Lack of space excluded English statutes, for example, the Law Reform Acts. In fact it was neither practicable nor necessary to include much English law, as the law of negligence forms a large part of the law of torts and the latter is always a compulsory subject for the English law student. We are, however, given extracts from the instructive Negligence Act and Highway Traffic Act of Ontario, which are not available in most English libraries. These are followed by an authoritative explanation of the Automobile Accident Insurance Legislation of Saskatchewan by Mr. John Green, reprinted from the *Journal of Comparative Legislation.*

The book begins with a concise but comprehensive Introduction of nearly 80 pages, in which the author's breadth of learning and analytical and critical powers are manifest. The Introduction is intended not so much to present a body of doctrine as to furnish the student with an intelligible order in which to read the texts. References are given in footnotes to all the important Latin texts dealing with negligence. Cross-references are here given to the sources contained in the rest of the book, and cross-references are given in the latter to the former, a most convenient system. The earlier sections of the Introduction deal with the *Lex Aquilia,* its relation to earlier legislation and the contents of the first and third chapters of the *Lex.* Professor Lawson seems to adopt Dr. Daube's view that *damnum* in relation to the *Lex Aquilia* means "loss suffered by the owner." As regards the "penalty" for damage covered by c. 3, he discusses the various theories about what the *Lex* originally meant, and adopts Dr. Daube's view that the 30 days were the days after, not before, the wrongful act. Professor Lawson boldly incorporates the latter into his translation of D. IX. 2, 27, 5 (*quanti ea res erit in diebus triginta proximis* "whatever the matter in issue shall turn out to be worth in the next 30 days"); though he translates *si quis alteri damnum faxit* as "if anyone does damage to another" and not, as Dr. Daube's first theory would indicate, "if anyone causes loss to another." The author thinks that *iniuria* originally meant *nullo iure* but gradually came to imply either *dolus* or *culpa,* these terms having, of course, a special meaning when the defendant claimed to have acted *iure.* In the sections on abuse of rights, the medieval and modern

development of a general action and the scope of the action, for which the author has drawn on his "Notes on the History of Tort in the Civil Law" from the *Journal of Comparative Legislation* and his "The Duty of Care in Negligence" from the *Tulane Law Review*, the Introduction moves away from the *Lex Aquilia* and becomes Comparative Law in a wider sense. The legal position of a slave is shown to have enabled the Romans to bridge the gap between damage to property and personal injuries. There is a clear discussion of the confusing problem of *actiones utiles* and *in factum*. It seems that there was no technical difference in the formulary system between *actio utilis* and *actio in factum*, but that Justinian's *actio in factum* is something quite different, *viz.*, a general action for damage done indirectly and without any physical damage to any specific object belonging to the plaintiff. The Romans' dislike of giving an action for a pure omission is also emphasised. Two distinctions emerge, which appear in most modern systems derived from or influenced by Roman Law, *viz.*, between damage caused by a positive act and damage caused by a pure omission, and between physical and purely pecuniary damage. Professor Lawson defends a limited need for the requirement of a duty of care. Even if it coincides with the test of reasonable foreseeability where physical damage is caused by positive act, there may be a liability for causing merely pecuniary damage carelessly, and for these cases it is necessary to show specific duties of care. The discussion passes on to *culpa*, strict liability and causation, attention being drawn to the difficulty of reconciling D. IX. 2, 11, 3; 15, 1, and 51 pr. As regards causation we are told that the Romans had a firm grasp of the significance of an interruption in the chain of causation, though they had the same difficulty as everyone else in deciding whether it had taken place in particular cases; and that no Roman solution helps us to decide how far the chain of causation can for practical purposes be taken to extend where there is no actual interruption by the conscious act of a human being. It is uncertain whether questions of contributory negligence were decided on the basis of the plaintiff's *culpa* or a breach in the chain of causation, but it is presumed that the whole of the damage was borne by one or other of the parties. The section on penalties and measure of damages discusses how the plaintiff's *interesse* came to include *lucrum cessans* and *damnum emergens*. Although the problem of remoteness played a significant part in the imposition of liability, there is only one case in the Roman Law texts where it relates to the extent of the penalty.

Our only regret is that this publication by the Clarendon Press indicates that we shall never have a revised edition of Grueber's over-explanatory and repetitive commentary on the *Lex Aquilia*, which has long been out of print and is difficult to procure second-hand. But if that is the price we have to pay for Professor Lawson's book, we will pay it gladly.

O. Hood Phillips.

Joint Torts and Contributory Negligence. By Glanville L. Williams ll.d., Professor of Public Law in the University of London. [London : Stevens & Sons. 1 and 558 pp. £3 3s. net.]

In this new study of concurrent fault Professor Glanville Williams has sought to illuminate some of the dark places in the law remaining after the Acts of 1935 and 1945 which, he claims, "in several respects have not been as well thought out as could have been wished." He has done this by a comprehensive examination of the present state of the law, and a critical analysis of the problems which are the legacy of the recent legislation.

The first part of the work is concerned with joint, or (as the author prefers) concurrent, torts. Once the initial difficulties caused by some new

legal terminology have been overcome, the first chapter presents a valuable and lucid survey of the distinction between joint and several wrongs. In the discussion of the special rules relating to collisions at sea, the confusion caused by the Maritime Conventions Act, 1911, in particular with regard to the principle in the *Milan,* is clearly shown. In the section on contribution under the apportionment legislation the author contends that even intentional wrongdoers should be able to claim relief under the Act. Here one may respectfully disagree—the maxim "*ex turpi causa non oritur actio*" must surely apply to tortfeasors who intend damage to the plaintiff. In such cases it cannot be said to be unjust or capricious that a plaintiff should recover *in solidum* from any one of the several wrongdoers.

Possibly the most important section of this part of the work is the lengthy discussion of the interpretation of the word "liable" in section 6 (1) (*c*) of the 1935 Act. It is interesting to note that Professor Williams establishes, by a new approach to this problem, that contribution may be claimed by a wrongdoer who was in fact not himself liable to the injured party, in other words, that the principle of the *Cairnbahn* may be applied to the interpretation of the Contributory Negligence Act. Here as often elsewhere in the work, comparisons with Canadian case-law help to point a solution to existing problems.

The second part of the work comprises a study of the law relating to contributory negligence, and the author uses as a connecting link between the two parts the modern idea that responsibility should be proportionate to the degree of fault. After considering the scope of the original defence, he turns to the vexed, but now happily academic, problem of the "last opportunity rule." In these chapters, an expansion and modification of an earlier article (9 M.L.R. 105), it is demonstrated that this doctrine was merely "an effort to do rough justice, and there was never any need to state it as a branch of any other department of legal doctrine." It was never, in fact, related to the general principles of causation (*contra* Lord Denman's dissenting judgment in *Radley* v. *L. N. E. Ry.* and Lord Sumner in *Loach's Case*) even through the maxim of "*novus actus interveniens.*" Furthermore, it is claimed that the doctrine of "last opportunity" is, in any event, displaced by the terms of the 1945 Act. The strong words of Denning L.J. in the recent case of *Davies* v. *Swan Motors* are approved.

The treatment in this book of the boundaries of Contributory Negligence has been discussed at length in another place by Lord Wright, and here mention will be made of only two aspects of this subject. In the first place the claim that there is an underlying unity between the doctrine of contributory negligence and the duty to mitigate damages is more than doubtful, in view of the wording of section 1 (1) of the Act of 1945. The second point concerns the maxim "*volenti non fit injuria.*" It is certain that the scope of the Act will be greatly restricted if the doctrine of voluntary assumption of risk is not kept within strict bounds, and the author suggests that (paras. 72–4) so strong has been the modern reaction to the defence of consent that it may now only limit the operation of the Act in cases where there has been "some sort of intercourse or communication between plaintiff and defendant," from which it can be inferred that the plaintiff waives his right of action in respect of the defendant's conduct. This is a far cry from the sturdy individualism of the nineteenth century, and may even be out of earshot of the most recent cases available to the author.

In his discussion of conduct amounting to contributory negligence the author emphasises, in another controversial passage, that negligent conduct in this respect implies no breach of a legal duty. There is no such thing as a self-regarding duty; here again the judgment of the Court of Appeal in *Davies* v. *Swan Motors* is approved.

Such brief mention of some of the more important problems dealt with can do but scanty justice to either the thoroughness or the scope of the work.

In particular, the discussions of the procedural aspects of the new legislation and of the limitations on the field covered by the 1945 Act merit closer attention. The final chapter comprises a draft codifying measure which incorporates some of the suggested amendments to the law, and the completeness of the book is enhanced by three Appendices covering English, Canadian and American apportionment legislation.

G. D. G. Hall.

Russell on Crime. Tenth Edition. By J. W. Cecil Turner. Two Vols.: (1) civ and 1–941 pp.; (2) viii and 942–1961 pp. (with index). [London: Stevens & Sons. 1950. £10 10s. net.]

Everyone who has tried his hand at editing one of these very old textbooks will sympathise with Mr. Turner in the task which he was set, to bring *Russell*, which is perhaps the oldest and certainly one of the most intractable of those still surviving, into a fit state to be of real use to the modern lawyer. The book first appeared as long ago as 1819 and its author had had a distinguished career as Chief Justice of Bengal. For its time it was certainly an outstanding work, and it was a time when by modern standards textbooks first became valuable contributions to the service of law. It has in the interval been edited and re-edited by a number of eminent practitioners under whom vast accretions to its bulk have been made and by whom but little of the old wood has been cut out. Mr. Turner is I believe, the first academic student of the criminal law who has undertaken the editorship, and his earlier contributions to this branch of the law have been so distinguished that we naturally look to him for an outstanding piece of work.

The result of his labours is certainly a much improved *Russell,* and if, as is so often the case with a long and detailed review, my subsequent comments give the impression that I am somewhat critical of Mr. Turner's work, I should like to emphasise my appreciation at the outset of the really valuable editorial work which he has accomplished. The very improvements which he has effected seem to me to prove that the book has passed its period of real usefulness to the profession, which ought to be provided with an up-to-date modern textbook on such an important subject. As it is, *Russell* has grown to a quite unmanageable length, with very nearly 2,000 pages; it is nevertheless only a partial treatment of the subject since some of the important modern statutory offences which are technically not misdemeanours, are either not dealt with at all or are only dealt with rather sketchily: the difficult problem of what are "special reasons" for not disqualifying the driver of a motor-vehicle who has been convicted under section 15 of the Road Traffic Act, 1930, being for example dealt with in a short footnote only. Incidentally, since Mr. Turner has now included a section on treason, in addition to providing some material on summary offences, the sub-title of the book, *viz.,* "A Treatise on Felonies and Misdemeanours" ceases to be accurate.

It ought to be quite possible to shorten the length of *Russell* by at least a third without diminishing its usefulness. Mr. Turner has done very little cutting or pruning, for he leaves the copious eighteenth- and early nineteenth-century case digests, which in their day were naturally of great importance, almost untouched, and since he has added a substantial volume of material on the topics in which he is particularly interested, the result is an increase of no fewer than 400 pages, which at the present time it is difficult to justify, especially as it means that the price has had to be raised to a figure which puts the book out of the reach of many lawyers. It should be observed, however, that the increase in size is not in reality so great as the above figure suggests. The print in the new edition is larger and more readable, and the whole format shows a marked improvement.

The greater part of the additional material appears in quite a small number of chapters—particularly those on Criminal Responsibility, Homicide, and Larceny. These are subjects on which Mr. Turner had already made valuable contributions to criminal jurisprudence, and one cannot resist the conclusion that he has given far too much of his attention to these topics, which clearly interest him intensely, to the exclusion of other parts of the subject. The reports of criminal cases show that in recent years the courts have been particularly concerned with such matters as false pretence cases, gaming cases, bigamy, murder, larceny, sexual offences, accomplices, summing up in receiving cases, and like troubles which are all typical of our modern complex civilisation. Apart from murder and larceny this is hardly reflected in the new *Russell,* which, for example, provides only the relevant sections of the Road Traffic Acts together with a few footnotes, and material of a not much more extensive character on gaming offences. It is, no doubt, true that many of the receiving cases are technically to be regarded as procedural; one is nevertheless a little disconcerted to find so many ignored, especially a leading case like *R.* v. *Abramovitch* (1912) 76 J.P. 287.

A great deal of cutting and pruning could be done in some of the chapters which Mr. Turner has left untouched. Do we, for example, really need 10 pages on Blasphemy, 15 pages on Piracy, 11 pages on Slavery, and 11 pages on Buying and Selling Public Offices?

The new edition still lacks a discussion of the general principles of criminal liability, which has always been a conspicuous lacuna in *Russell,* as, indeed, in all the older textbooks on this subject. It is true that Mr. Turner has gone some distance to repair this omission by substantially expanding the chapter on Criminal Responsibility, which had in earlier editions been in reality a chapter on criminal irresponsibility, dealing with infancy, lunacy, and the like. He has introduced a valuable historical discussion of *mens rea* in which he recapitulates views which he has expressed elsewhere, contending that *mens rea* depends on foresight of consequences. There is of course, as Mr. Turner admits, no clear enunciation of this doctrine in the cases, but he argues that it is a necessary deduction from the declared principle that a harmful deed done from inadvertence does not involve the doer in criminal liability, except of course where statute lays down a stricter responsibility. From this he proceeds to a useful elucidation of the meaning of negligence in criminal law, a topic which again occupies his attention in his section on Manslaughter.

Mr. Turner sets out his guiding principle at p. 38 when he says "It is incumbent upon writers, especially in matters of general principle, whenever there appears to be a lack of precision in the authorities to make concrete suggestions for the removal of doubts and difficulties. At the present day the law of homicide seems to elude formulation if nothing more can be done than to collate the words of authority, as set out in the reports of decided cases. In such a predicament it is useless to put the cases and instances in this or that order. The only solution is to decide upon one or more satisfactory general principles and to face the fact that this entails the abandonment of such declarations and dicta as conflict with them." Unfortunately he does not pursue this policy as wholeheartedly as one would like.

The modern doctrine of strict liability in connection with statutory crimes is for practising lawyers, indeed for students, of greater importance than the ancient one. It receives but scanty treatment in this general chapter, not more than a couple of paragraphs. There is no reference here to *R.* v. *Prince* (1875) L.R. 2 C.C.R. 154, and even in the section on abduction there is no real discussion of why a prisoner who bona fide and reasonably believed the girl whom he abducted was over the age of consent should nevertheless have to be held guilty: all that we get is a reference to the discussion of *Prince's Case* in A Modern Approach to Criminal Law. This is not really satisfactory, though it is a procedure followed on a number of occasions in this edition.

After Criminal Responsibility Mr. Turner has concentrated most attention on homicide and larceny. The chapter on Homicide in the old *Russell* was far from scientific, and in a number of ways was unsatisfactory. The new chapter is perhaps the best in the book. The old material is rearranged and new material is brought in. The examination of *mens rea* in respect of murder is particularly valuable, and the general theory advanced in Chapter 2 is elaborated in detail with an intensive examination of the case law. Mr. Turner is at his best here, and although the argument is lengthy it deserves the earnest attention of the profession. In the section on Manslaughter the history does get rather out of hand, running to more than 20 pages of text.

But it is in respect of larceny in particular that one feels that the editor's enthusiasm for the topic has run away with him. This chapter has been much rearranged and rewritten, again with obvious advantage to the work. But it has been expanded by some 70 pages, quite apart from an Appendix of 24 pages on *Ashwell's Case*. Sections which seem quite unnecessarily elaborate are those concerned with theft by bailees and larceny by a trick before 1857, the mental element in larceny before the nineteenth century.

The historical method which Mr. Turner has used with such success in his academic writings is often most illuminating, and is used with conspicuous success on a number of occasions in this edition of *Russell*. An example is the subject of provocation in Homicide. The law in the cases is confused, and cannot properly be understood without appreciating the historical growth. It may perhaps be thought that history is pursued here at the expense of clarity of arrangement; for it is disconcerting to find confession of adultery dealt with under "provocation by words"—"provocation by suspicion or expectation of adultery" being discussed in quite another place. Surely discovery of adultery, which received individual treatment in the earlier editions, is the heart of the matter, but Mr. Turner deals with it in passing as part of his historical survey.

Another useful feature of this edition is the citation of the periodical literature on the subject. Since this is a new departure one cannot expect the references to be exhaustive—some of the most important articles on the M'Naghten Rules for example are not referred to, as "A Century of the M'Naghten Rules" by H. Barnes in 8 C.L.J. at 300. Again Mr. Ellenbogen's essay in the first volume of the *Journal of Criminal Science* on the Principles of the Criminal Law Relating to Insanity might with advantage be referred to in list of articles mentioned at p. 55, as bearing on *R.* v. *McNaghten*. The article by Professor Glanville Williams on "What is a Document?" was incidentally published in Volume 11 of *The Modern Law Review*, not in Volume 2.

Space prevents a detailed discussion of the various chapters and I must content myself with picking out a few points which Mr. Turner might consider against his next edition. Too little attention has been paid to the section on Infancy: the new material from the 1948 Act is rather cursorily inserted, and in a treatise like *Russell* one would expect a more detailed discussion of the dicta in *R.* v. *Williams* [1893] 1 Q.B. 320, relating to the possibility of a child being convicted of an attempt at rape, a point which is also twice repeated without comment in the chapter on Rape.

R. v. *Rivett* (1950) 34 Cr.App.R. 87, is referred to in the Index but not in the text, at any rate on the page given! This case strengthens Mr. Turner's helpful discussion of the distinction between insanity and criminal irresponsibility. Incidentally the form of verdict in insanity might be mentioned.

A somewhat similar slip is made over *Ruse* v. *Read* [1949] 1 All E.R. 398. In dealing with drunkenness Mr. Turner states that "there is no reported decision in England on the question whether drunkenness can be considered as negativing the *animus furandi* in larceny" (p. 66). But *Ruse* v. *Read* is such a case, and in the chapter on Larceny is quoted at some length on that very point (p. 1185).

The subject of the criminal responsibility of corporations is one of great difficulty, and increasing importance. It clearly needs careful and authoritative discussion. Mr. Turner brings in the recent decisions such as *D. P. P.* v. *Kent and Sussex Contractors* [1944] 1 K.B. 146, but otherwise makes no attempt to improve on the unsatisfactory paragraph in the previous edition. Apart from a reference to an article by Sir Roland Burrows in the *Journal of Criminal Science* the periodical literature is not cited.

The modern crime of public mischief which has been before the courts on a number of occasions, and has given rise to much discussion in the profession receives unexpectedly cursory treatment, being referred to only by way of reference to *R.* v. *Manley* (1932) 24 Cr.App.R. 25, as an illustration of misdemeanour in the first chapter.

The peculiar chapter on Robbery and Blackmail has been left unreformed. There is no sufficient similarity between these crimes to justify their treatment in one chapter. Larceny by Intimidation which is dealt with in the next chapter would come more appropriately here. The discussion on blackmail, an important and too common offence, is inadequate, especially in respect of *Thorne* v. *Motor Trades Association* [1937] A.C. 797, which has an important bearing on this subject, and is worth more than a reference in a footnote.

I am indebted to my colleague Mr. J. E. Hall Williams for a number of the points which I have discussed in this review.

C.

PRINCIPLES OF THE COMMON LAW. By A. M. WILSHERE M.A., LL.B., of Gray's Inn, Barrister-at-Law, and BARRY CHEDLOW, of the Middle Temple and the Midland Circuit, Barrister-at-Law. Sixth Edition. [London: Sweet & Maxwell. 1951. xlvii and 846 pp. (with index). £2 12s. net.]

It is seven years since the last edition of this book appeared, and bringing it up to date must have been a formidable task. The author has been fortunate in having the assistance of Mr. Chedlow, who has been responsible for revising several of the chapters on Commercial Law. The only change in the content of the book is that the section on Evidence has been omitted. In view of the fact that it endeavoured to cover that branch of the law in the space of 38 pages, its omission is no real loss. Apart from this change, we are presented with the mixture as before, except that it is now published in one volume instead of two. The chapters on Commercial Law are just as condensed as ever, while the sections dealing with the general law of contract and tort expound these subjects at considerable length.

This prompts one to speculate on the purpose which the book is designed to serve. One wonders how many students place substantial reliance upon the sections on Contract and Tort for their knowledge of these subjects. The section on Mercantile Contracts covers so much commercial law in such little space that the student is served up with potted law in a highly indigestible state. This section may be of great assistance to students preparing for certain professional examinations, but that can only be a reflection upon the examinations themselves.

In the sections on contract and tort it is reasonable to expect a high standard of exposition, although the same completeness cannot be expected in the more condensed parts of the book. On the whole, this expectation is realised. There are, however, several shortcomings. The *High Trees Case* is referred to at p. 41 without any comment or explanation; *Re Polemis* is referred to only in a footnote in the passage on remoteness of damage in tort (p. 285); the chapter on Master and Servant contains no mention of *Collins* v. *Hertfordshire County Council* [1947] 1 K.B. 598, although the

other "hospital" cases are discussed; in the same chapter *Warren* v. *Henlys* [1948] 2 All E.R. 935 is not included, and the case of *Century Insurance Co.* v. *Northern Ireland Transport Board* [1942] A.C. 509, did not involve the Imperial Smelting Co. (p. 303). Elsewhere, the following cases might well have been noted: *N.U.G.M.W.* v. *Gillian* [1946] 1 K.B. 81 (a trade union can sue in tort); *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109 (following *Chapman* v. *Ellesmere*); *Jack Clark (Rainham), Ltd.* v. *Clark* (1946) 62 T.L.R. 705 (concerning the Rule in *Smith* v. *Selwyn*). It is not sufficient to describe slander as defamation "by words only" (p. 425), and opinions will differ as to the desirability of treating *Rylands* v. *Fletcher* liability as a particular species of nuisance. In incorporating statutory changes in law into the text, there is a tendency to reproduce the statutory provisions bare of any comment or explanation. This may be permissible in the more condensed parts of the book: it is surely regrettable in the more expansive sections, and in particular with regard to joint tortfeasors and contributory negligence.

In conclusion, it is only fair to observe that most recent decisions of importance have been noted, and that recent statutory changes have been incorporated into the text where necessary. It would therefore be charitable to overlook the deficiencies, and compliment the editors on the large measure of success which they have achieved in their difficult undertaking.

J. E. Hall Williams.

Gale on Easements. Twelfth Edition by D. H. McMullen m.a., of Lincoln's Inn, Barrister-at-Law. [London: Sweet & Maxwell. 1950. xxxiv and 589 pp. £3 10s. net.]

Eighteen years is a long period to elapse between successive editions of a work as important and authoritative as *Gale*. Fortunately there have been no major developments in the law of easements. Once the present editor had decided to avoid Town and Country Planning—perhaps a wise decision in the circumstances—he has had to deal with no legislation of major importance, and of the few reported cases not all have been considered worthy of reference.

We should be led to expect that the opportunity afforded by a new edition had been taken for a general revision of the text and in this we shall not on the whole be disappointed. For too long *Gale* has been the repository of some dead law and many moribund cases, interesting no doubt to the historian but out of place in a textbook of living law. Something of this has been pruned away, notably in the section on implied reservation of easements. Other passages have been considerably improved by rewriting, such as the discussion of the effect of changes in the dominant tenement on the uses of rights of way, no doubt under the inspiration of *Todrick* v. *Western National Omnibus*. There is also a completely new section on equitable easements. We may thus congratulate Mr. McMullen on having produced an edition which is a marked improvement on the last.

But much remains to be done. There are still too many old cases. To have eight pages of ancient decisions on implied grant (pp. 108–115) is a convenience to the historian, but no modern lawyer will want to delve deeper than, say, *Polden* v. *Bastard* or *Watts* v. *Kelson*; as Mr. McMullen himself points out (p. 145) "If necessary, . . . former editions can be referred to." Then there is the constant citation of Roman Law. Has not the time come when this valuable old scaffolding can be dispensed with? We would willingly exchange most of it for a discussion of American developments, and especially of the enormous divergence between our laws created by the American acceptance of easements in gross. And *Gale* is still disfigured by the excessive length of its footnotes, a technique suitable no doubt to the *biblia*

abiblia of the medieval glossator and the modern Town Planner, but out of place in an exposition of an organic body of law.

Less immediately obvious, but fundamentally more disturbing is the suspicion that too much raw material has been introduced from generation to generation without being really assimilated. Even the initial problem of the definition of easements has become more obscure by Mr. McMullen's acceptance of the dictum that the category of easements has not closed, so that the practitioner who wishes to know whether his client's right is capable of being an easement is not given that guidance which he is entitled to expect from the standard book on the subject. No doubt the ultimate solution will emerge when it is appreciated that all the so-called "new" easements involve rights of entry, that the "novelty" consists merely in the new purposes for which those rights of entry are granted, and that no new "negative" easements have been, or are likely to be, accepted.

More immediately urgent are the twin problems of the "general words" of section 62 of the Law of Property Act, 1925, and the doctrine of "implied grant." These two aspects of what is occasionally the same problem were frequently confused in the earlier cases, and there are still some lawyers who maintain that the doctrine of implied grant, as between vendor and purchaser, is of no, or of little, importance since 1881. The real significance of each can only be appreciated by deliberate comparison, but in *Gale* there is no comparison, and hardly a cross-reference. To particularise, we would say that this lack of comparison is really the cause—perhaps also the effect—of the inadequate treatment of two vital modern cases, *Long* v. *Gowlett* [1923] 2 Ch. 177, and *Borman* v. *Griffith* [1930] 1 Ch. 493. The first is dealt with in a footnote to the statute, instead of in the text, as it should have been. Successive editors, moreover, have been content merely to reproduce the headnote from *The Law Reports,* and unfortunately that headnote lays nothing like sufficient stress on the *ratio decidendi*—Sargant J.'s insistence that for the section to create a completely new easement there must have been, even during the common ownership, some "diversity of ownership or occupation" of the quasi-dominant tenant, generally (though not necessarily) indicated by the separate possession of a lessee. In this respect, the learned judge was following the line of pre-1882 cases dealt with in pp. 88–97 of *Gale.* This necessity for some diversity of ownership or occupation does not exist in the rules relating to implied grants, though this latter doctrine extends only to continuous and apparent benefits. (We have no time now for the ghost of "reasonable necessity" with which the Court of Appeal has recently frightened us).

Borman v. *Griffith* decides two points. First, it reiterates the rule that section 62 does not apply to contracts, *i.e.*, that it gives no contractual rights. Strangely enough there is no reference to the case on this point in that part of *Gale* which deals with the section. But secondly, it decides that the doctrine of "implied grant" *does* apply to contracts between lessor and intending lessee, and consequently to contracts between vendor and purchaser. In other words, this doctrine has two aspects—it implies terms into the contract, and then—we may now say by consequence—it implies the necessary grant into the ultimate conveyance. This contractual aspect of *Borman* v. *Griffith* has not been appreciated by the editors of *Gale,* yet it is of obvious importance. Apart from its implications as to the basis of the doctrine, it presumably means that a purchaser with this kind of implied contractual right may insist on the conveyance including an express grant. It means also that the circumstances to be taken into account in determining the application of the doctrine are those existing at the time of the contract and not those existing at the time of the conveyance, thus differing from the operation of the general words as interpreted in *Goldberg* v. *Edwards* [1950] 1 Ch. 247. But these are small matters. The vital point is that under the doctrine of implied grant a purchaser will get only those easements to which he has an implied contractual right, whereas from the general words he may well

get an easement to which he has no contractual right whatsoever. Now Mr. Megarry has suggested (*Manual of Real Property*, p. 438) that in this latter case the vendor may have the conveyance rectified. It happens that there seems to be no authority for this proposition save where there is a conflict between the conveyance and the *express* terms of the contract, but we should have expected to find a reference in *Gale* to Mr. Megarry's views on such an important topic. It is also true that a vigilant vendor may insist on restricting the application of the general words by inserting an appropriate clause in the conveyance (as, *e.g.*, in *Re Peck and London School Board* [1893] 2 Ch. 315), but too many vendors are unaware of their danger, and for this some blame must be attributed to the various editors of *Gale* for their failure to appreciate, or at least to emphasise, the legal position. Perhaps this is also the reason why no attempt is usually made to clarify matters by the insertion of some clause in the standard General Conditions of Sale. The Birmingham Law Society's Conditions, for instance, incorporate section 62 into the contract, but this seems to be too hard on the vendor, who cannot be expected to appreciate the relevance of facts known only to him. There is something to be said in favour of giving a contractual right to an intending purchaser or lessee who has himself, as a former lessee, enjoyed the quasi-easement, but the justice of allowing a third person to take advantage of the generosity or ignorance of the vendor is less obvious. In any event, contractual amendments of the law do not excuse the law itself. The time has surely come when the legislature should intervene.

We must make it clear that our sympathies are with Mr. McMullen. To re-edit a classic now over a hundred years old is to undertake a task which must inevitably arouse criticism. And if the law is to live, each generation must write its own textbooks. That is why we would appeal to the publishers, as not the least influential of the trustees of the law, to allow *Gale* to relax into honourable retirement, to give us a completely new work on easements, and to persuade Mr. McMullen to write it.

A. D. Hargreaves.

Palmer's Company Precedents, Part I, General Forms. Sixteenth Edition by His Honour A. F. Topham K.C., LL.M., Bencher of Lincoln's Inn. [London: Stevens & Sons. 1951. xcviii and 1238 pp. £5 10s.]

A new edition of this famous work is an event; particularly as the former edition was published no fewer than 20 years ago. To every practitioner with a company-law practice "the big *Palmer*" (and especially Volume 1) is indispensable, for it is one of the very few practitioners' books which really are practical. Since its first appearance in 1877 it has exercised an influence over the development of company law and practice which is probably unparalleled elsewhere in the whole of English legal literature. Judge Topham had already been responsible for five editions extending over 30 years prior to his recent lamented death, and on this occasion he dispensed with the team of assistants who formerly supported him. The profession owe him a deep debt of gratitude and will be united in regretting that he will be unable to undertake further editions of a book which has now become associated with his name almost equally with that of Francis Palmer.

Many changes have been made in the new edition. The alterations in the law made in 1948 have necessitated extensive additions of new material, and, to keep the volume within reasonable dimensions, notes on elementary matters and the full text of the Act have been omitted. Few will quarrel with this change, although all will not share the view of the editor and publisher that Palmer's *Company Law* ("the little *Palmer*") is the ideal work to be used as a supplement to the larger book. Table A and Extracts from the Stock

Exchange Rules are, happily, still printed, but one regrets the deletion of the various sections of the Finance Acts of particular relevance to companies—it was, in practice, most convenient to have these handily collected. The set-up has also been altered and, undoubtedly, greatly improved. The index too has received attention and the learned editor has succeeded in materially reducing its bulk without impairing its efficiency.

There has been some rearrangement of material and a number of new forms have been included. Particularly welcome are the increased recognition of the importance of the Stock Exchange Regulations (see, for example, pp. 152–155), and the form of Minutes of the Board Meeting in connection with a bonus issue (Form 492). It is suggested that consideration might be given to the possibility of including still further examples of Directors' Resolutions which often require just as careful drafting as Members' Resolutions but for which there are rarely any printed precedents (incidentally Form 492 is not mentioned under "Minutes" in the Index).

Use of this edition has already shown that it is even more valuable than its predecessors. It has, however, stimulated the following minor criticisms which are mentioned in the hope that they may receive consideration for the next edition. In the first place, no hint seems to be dropped of the fact that it is now the almost universal practice not initially to form a public company but to register it as a private company and immediately to convert it. It would certainly be helpful to the practitioner if the advantages of this procedure were explained. It is also felt that greater attention might be paid to the all-important implications of taxation; in this connection the brief reference (at p. 739) to death duties is not merely inadequate but positively misleading in the light of the *Crossman Case* and the Finance Act, 1940. After Form 99 (Agency Agreement for Foreign Country) there should surely be a precedent for an Exclusive Sales Agreement, a much more common type of arrangement with a foreign representative. Finally, it is suggested that the forms of objects clauses might be pruned and modernised. It is unlikely, alas, that any further English companies will be formed to run American Railroads (Form 224), nor does it seem necessary to devote over a page to the objects clauses of a Tramway Company (Form 225)—the comment that "as a result of nationalisation companies of this type will probably be rare in future" is surely an understatement? On the other hand one looks in vain for objects clauses for an air charter company, football pool promoter, or stud farm—to name only three not uncommon examples.

But these are indeed small points in a work of this magnitude. The profession will eagerly await the remaining two volumes.

L. C. B. G.

The Rent Acts. By R. E. Megarry. Sixth Edition. [London: Stevens & Sons. 1951. 611 pp. and Index 22 and Tables lxxvi. £2 10s.]

In his Preface the author speaks of the book's further loss of "youthful slenderness," perhaps disappearance would be more appropriate, since the book is now one of some 600 pages (including statutes, etc.). This growth is not to be wondered at. Apart from the steady stream of litigation on the topic, which is sufficiently demonstrated by a glance at any volume of law reports, it has been necessary to add in this edition some 40 pages to the Appendices setting out statutes and statutory instruments. The only surprise is that the increase in the text has been kept within modest proportions. That has been achieved by considerable rewriting. New cases and new material have not merely been noted but thoroughly incorporated. That task was all the greater since "new material" includes not only cases decided

since the last edition, but also newly discovered material; so that even the most persistent annotator of the old edition may learn something from the new.

If the quality of slenderness has ceased to have much connection with the book the same cannot be said of youthfulness. The process of rewriting has resulted in this edition in a book which, while it enjoys the comprehensiveness of the old, is markedly easier to follow. In part this is due to new divisions by chapters and subheadings and in part to rearrangement. The first two chapters on the true Rent Restriction Acts, their operation, mode of construction, and the jurisdictions involved give a much clearer picture of the system as a whole as does the treatment of the substantive law of the Act of 1946, in a separate chapter rather than as an excursus in the chapter dealing with excepted tenancies. Those passages dealing with premiums, the nature of the statutory tenancy, the revision of standard rents and mortgages, are specific instances of passages which make clearer reading.

Indeed, if there is any complaint it might be that the present edition, while not neglecting detail, almost makes the system appear intelligent and intelligible. The nature of the legislation ensures that the qualification must remain, but there is perhaps something to be said for the view that reform is more likely to come from confusion than from clear exposition of the law. Practitioners will no doubt be grateful that the author clearly does not share this view and has done his best for the law. A second frivolous comment might be that the book shows that the habit of referring, albeit obliquely, to one's earlier writing as authority for present statements has spread from the Bench to the Bar (see p. 376). Frivolity aside, however, the new Megarry is more than worthy of its predecessors.

J. D. B. Mitchell.

Jackson and Gosset on Investigation of Title. Sixth Edition. By Edmond H. Bodkin m.a., of Lincoln's Inn, Barrister-at-Law. [London: Stevens & Sons. 1950. lxiv and (index) 57 pp. £2 10s. net.]

Whereas 24 years elapsed between the issue of the fourth and fifth editions of this well-known work, it is only four years ago since the fifth edition appeared. The fifth edition saw a change of typographical presentation. The "Requisitions" on Title, one of the main features of the book, a feature on a scale to which no other single volume supplied a parallel, were printed for the first time then in the same type as the text, whereas in the former editions the use of a different type for the Requisitions enabled the illustrative matter to be clearly distinguished from the statements of substantive law, thus greatly facilitating reference. The new edition incorporates the developments and changes in the law associated with the Town and Country Planning Act, 1947, and kindred legislation, while a new section is devoted to the Rent Restriction Acts in summary form preceding the relevant Requisitions. If ever a book in the sphere of conveyancing, apart from the sets of Conveyancing Precedents, fully merits its envisagement as a work of practical utility, *Jackson and Gosset* in its own sphere is unsurpassed, its format and comprehensiveness make it a most valuable companion to the various textbooks and sets of the precedents in the well-established series, and has proved its serviceableness, not only in respect of its repertory of Requisitions but also by reason of its compendious statements of Property Law, as an accessible handbook for the practitioner, both at and when away from chambers or office. Two points again call for notice—one is that in the Analysis and Notes on Title it would be far better to substitute letters of the alphabet for the fictitious names which have been chosen. The other point concerns the tendency nowadays to pass over the full designation, if not the names, of original authors and previous editors. It was a welcome feature of

many of the older textbooks to evince a gratifying *pietas* by mentioning the names of those who originated a book and those who formed links in the tradition of its continuity. The learned editor has again surmounted a task of very considerable complexity with great advantage to those who make use of this essential volume in the Conveyancer's Library.

Bertram B. Benas.

Yearbook on Human Rights for 1949. [New York: United Nations. 1951. xvi and 421 pp. 37s. 6d.]

The fourth volume of the United Nations *Yearbook on Human Rights* differs but little from its predecessors. There are the three usual sections devoted to national legislation, international treaties and agreements, and the activities of the United Nations in so far as they affect human rights. This volume however, introduces a new section concerned with the position in trust territories and the non-self-governing territories, although there is no reference to the position in South-West Africa, despite the fact that the General Assembly was seriously concerned with that territory from 1946 onwards and in 1949 asked the International Court for an advisory opinion on its status.

Of the countries whose national legislation is considered 49 were members of the United Nations, Bolivia, China, Ethiopia, Lebanon, Nicaragua, Panama and Paraguay being notable absentees. Sixteen non-members, including Austria, Bulgaria—in fact the Soviet Union and Eastern Europe are notable for their contributions, many of which relate to nationality or to elections—apparently, unlike the situation in Soviet Russia, it is not illegal for a Bulgarian to marry a foreigner—the two Germanies, Japan, (South) Korea, Liechtenstein—whose sole contribution relates to the Defence of the State Act, 1949—the Saar, and most of the countries whose applications for admission to the United Nations have been rejected.

The report from the United Kingdom details no improvements in the status of human rights, instead there is a most interesting account of "The Writ of Habeas Corpus" prepared by Sir Oscar Dowson. In the same way, many other States who are content with the position concerning human rights within their territory merely subscribe a note on development. Australia is one of these States and has particularly referred to the Commonwealth's educational laws. There is, however, no reference to the operation of the Immigration Acts and the discrimination practised thereunder. The United States report gives an interesting summary of the improvements that have been effected in 1951 through the medium of legislation and judicial decision both on a Federal and a State level, and the value of the President's Committee on Civil Rights is clearly seen from the report. Since 1946 the position of the Negro has gradually improved in the United States. The same, unfortunately, cannot be said of the Union of South Africa. No hint of this, however, appears from the entry on this country in the *Yearbook*. Here there appears an abbreviated version of the Asiatic Land Tenure Amendment Act which gives the impression that the Act is a guarantee of human rights, for "No European shall occupy and no person shall allow any European to occupy any land or any premises in the Province of Natal (other than land or premises in an exempted area) which was not lawfully occupied or is not under section six deemed to have been occupied at the fixed date by a person who is not an Asiatic, and no Asiatic shall occupy and no person shall allow any Asiatic to occupy any such land or premises which was not lawfully occupied or is not so deemed to have been occupied, at the fixed date, by an Asiatic, except under the authority of a permit issued under section eight" (section 4).

The documents included in the *Yearbook* are useful so far as they go. They do not, however, go far enough. Reading them one may easily assume

that everything in the 61 countries contributing is conducive to the promotion of human rights. Too much emphasis is placed on paper rights, and not sufficient on reality. The *Yearbook* could only gain by the inclusion of sections which would almost certainly have to be compiled by the Secretariat, giving details of legislation contrary to human rights, to judicial decisions tending to promote or to derogate from such rights, and providing a bibliography of some of the articles written on the subject during the year under review.

L. C. Green.

The Velpke Baby Home Trial. Edited by G. Brand. War Crimes Trials Series, Vol. 7. [London : Hodge. 1950. liv and 356 pp. 18s.]

The "Double Tenth" Trial. Edited by C. Sleeman and S. C. Silkin. War Crimes Trials Series, Vol. 8. [London : Hodge. 1951. xxxii and 324 pp. 18s.]

A world which has recently seen the release of some of the most notorious and monstrous of the war criminals needs to be reminded of what happened in Germany and the occupied countries during the War. The same is true of the Far East, for with the recent signature of the Japanese Peace Treaty it has become crystal clear that it will not be long before all the Japanese "purge" legislation has itself been purged, and the honorary aryans will become paragons of civilisation and Democracy. Sir David Maxwell Fyfe as general editor is to be congratulated on keeping the issue in the public eye, for only through the medium of the "War Crimes Trials Series" is it possible to obtain a detailed account of these trials, which would otherwise remain hidden in some official file securely tied with red tape.

There is little in the *Velpke Baby Home Trial* that requires comment. The offences charged were as common as any that were perpetrated against "inferior" peoples by the "Master Race." Polish girls working on farms in Germany sometimes became pregnant, but since a pregnant woman could not work as well as one who was not marriage was forbidden to these Polish women. Nevertheless, this did not stop the births, and when the babies were born they were taken from their mothers within a few days of their birth and sent to a home at Velpke. This home was not well run, there were no sanitation or heating, no facilities for looking after babies and the matron had no qualifications. It reads strangely, however, to find the court accepting an allegation that it is a war crime merely to deprive babies of their mothers' milk and to attempt to rear them on artificial feeding. The war crime lay in the surrounding circumstances and the lack of attention and treatment given to the babies, but this had nothing to do with the deprivation of human milk. Similarly, it seems hard to punish a panel doctor who is terribly overworked, who has an immense practice, who is single handed and attends the babies whenever they are brought to him, merely because he knew of the heavy death roll and did not make it his first business to go to the home, even though not called, neglect the rest of his practice and cease to act as a normal panel doctor practising in wartime Germany.

With most of the war crimes trials it is possible to say that despite lax rules of evidence—and the *Velpke Case* is no exception—justice has in the end been done, with the *Velpke Baby Home Trial* this may be true of most of the defendants but it certainly appears as if the unfortunate doctor has been the victim of a gross miscarriage of justice. Even the learned editor does not seem too happy about the trial. Instead of devoting his Introduction to an exposition of the case, he has primarily given a summary of the jurisprudence of the United Nations War Crimes Commission of which he was an official.

Of the *Double Tenth Trial* even less need be said, for the verbatim report of this was made available in 1947 under the imprint of the *Malayan Law Journal*, and that version of the trial was more complete than that now edited by the counsel for the prosecution and the president of the court. This was the first trial of Japanese war criminals and concerned the ill-treatment of civilian prisoners in Changi Jail. The evidence of Japanese torture is revolting, but the examples of human fortitude and loyalty under such treatment tend to relieve the sickening picture.

The trial gets its name from the fact that the events which gave rise to it occurred on October 10 when the Japanese selected a number of the prisoners and accused them of contact with the outside world and organising an attack on shipping in Singapore Harbour. The trial is significant not so much for any rule of law that it brings out, except for the inevitable plea of superior orders, as for the insight it gives of the organisation of the Japanese *Kempei Tai*—military police—and of the ramifications of Japanese psychology.

It is difficult to appreciate why this volume was included in the series in view of the earlier publication, and it is even more difficult to understand why it has been abbreviated. The editors' introductory remarks are mainly concerned with the background in Singapore and the events in Changi Jail which would have come out quite easily if the full report had been published. The only significant comment of a legal character they have seen fit to include is a reference to the fact that no civilian or soldier can plead superior orders to a war crime allegation.

L. C. Green.

Soziologie der Deutschen Nachkriegs-Kriminalität. By Karl S. Bader. [Tübingen : J. C. B. Mohr (Paul Siebeck). 1949. xv and 209 pp. Dm. 9.80.]

To write the history of postwar crime in Germany would have been a formidable undertaking even in the most favourable circumstances. Dr. Bader, Generalstaatsanwalt and Professor at Freiburg i. B., had to embark upon it with only the scantiest material equipment and at a time still too near the events. Criminal statistics were available not for the whole of Germany or even Western Germany but only for police or court districts or towns or *Länder* and only from 1948 for the whole of the British Zone (pp. 10 *et seq.*). There was, therefore, no uniformity or consistency in the collection of the material, and even in important matters, such as the age distribution of criminals, very little reliable information seems to have existed (pp. 147, 151). Moreover, on account of the restricted jurisdiction of the German criminal courts many offences dealt with by Allied courts did not come to the notice of the German authorities, a factor which, as the author realises, may have made his picture in some respects incomplete or even distorted (pp. 10 and 34). On the other hand, his official position opened him many doors which might have remained closed to an outsider, and with the assistance of material from his own practical work and that of his colleagues in other districts, supplemented by a comprehensive use of Press reports, Dr. Bader has at least succeeded in laying the foundations for the criminological history of a period of unusual interest and perhaps unsurpassed difficulties to the research worker. This does not mean that his methods of research and his findings are throughout beyond criticism. The lack of more comprehensive material may have led him without adequate reasons to treat local statistics as representative of the whole of Western Germany (*e.g.*, p. 76), and the, at the time almost complete, absence of foreign criminological literature in German libraries forces him, for example, to reproduce some English figures from a Swiss newspaper quoted in a German periodical (p. 3, footnote 12).

The author is at pains to dissociate himself from the ideologies and methods of the Nazi régime. He makes no attempt to deny or minimise its moral responsibility in the criminological sphere or elsewhere (*e.g.*, pp. 2, 5, 6, 8, 22, 33, 68, 127, 201), and he regards Germany's postwar criminality, as the war itself, largely as the inevitable outcome of that epoch (pp. 124, 127).

The book is divided into two main parts, the first, in the author's terminology, dealing with the phenomenological, the second with the sociological aspects of the subject, which means that, whereas in the former the actual criminological position is described for each of the more important offences of the German Criminal Code, in the latter an outline is given of the principal causal factors responsible for that position. This division, though perfectly legitimate in theory, inevitably leads to occasional repetitions.

The most conspicuous feature in postwar developments emerging from the author's narrative—a feature not limited to Germany—is the increasing primitivity of crime (pp. 75, 84) which expresses itself in a steep rise in crimes of violence and the cruder forms of sexual offences. In the field of economic crime the same tendency is shown, at least superficially, in the decline of the more sophisticated types of offences such as false pretences and receiving. However, as the author points out, since the place of these two offences has largely been taken by black-marketeering (pp. 90, 103), we are here faced with a transformation rather than a decline.

The second outstanding postwar feature—which again is not peculiar to Germany—is the tendency of new, in normal times not criminally inclined, sections of the population to succumb to the excessive temptations of that period (p. 177).

The weakest parts of the book are the, all-too-brief, psychological chapter and the final part in which the author presents his practical conclusions and proposals for the reform of the German system of criminal justice. They are frankly disappointing. The author's lack of familiarity with experiences abroad leads him to reject off-hand the replacement of the old double-track system of preventive detention by the one-track system of the Criminal Justice Act, 1948, as well as the amalgamation of penal servitude with imprisonment under the same Act, and to make him unduly sceptical of the indeterminate sentence. From the undeniable fact that punishment is, on the whole, of little influence on the movements of criminality he concludes that utilitarian considerations should take second place in the penal system, and although he is against a wholesale stiffening of penalties, his essentially retributive philosophy may easily produce this result (pp. 197 *et seq.*).

Hermann Mannheim.

The Trial of German Major War Criminals. Part 22. [London : H.M.S.O. 1950. 556 pp. 10s.]

This volume is the last of the Proceedings of the International Military Tribunal sitting at Nuremberg to be published by Her Majesty's Stationery Office, which is to be congratulated on the service it has rendered to international lawyers in making these records available. It is to be hoped that a similar venture will be undertaken in connection with the Tokyo Tribunal.

It is unfortunate that the Attorney-General has allowed his office to become entangled in the "cold war" instead of preserving its function of objectively reproducing a text "taken from the official transcript." The volume contains the concluding speeches on the indicted organisations—the prosecution section has already been published separately—the final statements by the defendants and the judgment. It is perhaps fortunate that the Stationery Office published the judgment as a separate publication as early as 1946, at a time when people were still prepared to talk of the reasonable attitude of the Soviet member of the Tribunal, and to accept his dissenting judgment as

a statement of opinion that might have been rendered by any judge in similar circumstances. Now we are informed in the "blurb" accompanying the final volume of the series that "the dissenting opinion appears as an early foreboding of the 'cold war': it is according to the now familiar pattern, partly based on inaccurately presented or even invented facts. . . . [Therefore] in the interests of historical truth inaccuracies of a substantial nature are indicated in footnotes to the dissenting opinion." These footnotes are both interesting and valuable, but one may question whether an authoritative official report, and not a commentary published as a White Paper, is the correct place for them.

These 22 volumes are only directed to the verbal proceedings, and it is to be hoped that when paper difficulties have eased the Stationery Office will be instructed to issue one or two volumes containing some of the leading documents admitted as evidence. Similarly, an index to the whole series would prove most valuable.

At a time when General Eisenhower is telling us to forgive the Nazis, and Mr. McCloy is releasing condemned war criminals, not because they were innocent but because circumstances have changed, it is as well to be reminded of the Nuremberg Judgment: "The truth remains that War Crimes were committed on a vast scale, never before seen in the history of war. . . . There can be no doubt that the majority of them arose from the Nazi conception of total war. . . . War Crimes were committed when and wherever the Führer and his close associates thought them to be advantageous. They were for the most part the result of cold and criminal calculation (p. 449). . . . The carrying out of this order [for the murder of Soviet prisoners] was the responsibility of the military authorities . . . (p. 452). The territories occupied by Germany were administered in violation of the laws of war. The evidence is quite overwhelming of a systematic rule of violence, brutality, and terror . . . (p. 453). [The members of the General Staff and High Command] have been responsible in large measure for the miseries and suffering that have fallen on millions of men, women and children. They have been a disgrace to the honourable profession of arms. Without their military guidance the aggressive ambitions of Hitler and his fellow-Nazis would have been academic and sterile. The contemporary German militarism flourished briefly with its recent ally, National Socialism, as well as or better than it had in the generations of the past. . . . They actively participated in all these crimes, or sat silent and acquiescent, witnessing the commission of crimes on a scale larger and more shocking than the world has ever had the misfortune to know (p. 484)."

London. L. C. Green.

Shipping Law. Second Edition. By Lord Chorley, m.a., of the Inner Temple, Barrister-at-Law, formerly Sir Ernest Cassel, Professor of Commercial Law in the University of London, and O. C. Giles ll.m., of Gray's Inn, Barrister-at-Law. [London: Sir Isaac Pitman & Sons, Ltd. 1951. xxvi and 364 pp. 30s.]

When this book was first published in 1947 it filled a conspicuous gap in legal literature. Its value is shown by the fact that a second edition has already been called for, and the opportunity has been taken to rewrite a number of sections in addition to revising the whole of the text and bringing it up to date. The learned authors have contrived to keep the work as simple as possible so as to be comprehensible to students without a thorough legal background. Nevertheless, parts of it (perhaps inevitably) are heavy going for non-legal readers and it is respectfully suggested that, for the next

edition, consideration should be given to the all-important chapter on Contracts of Affreightment which, it is thought, could be made still clearer by rearrangement of the already excellent material.

The publishers are to be congratulated upon maintaining the price at a reasonable figure, but it is unfortunate that they took so long to pass the book through the press; although the Preface is dated March, 1950, the date of publication is as late as May 22, 1951, with the result that a number of important recent cases are omitted.

L. C. B. G.

Legal Aid. An Introduction to the Working and Provisions of the Legal Aid and Advice Act, 1949. By Eric Sachs K.C., Recorder of the City of Stoke-on-Trent. With a Foreword by Lord Jowett. [London : Eyre and Spottiswoode. 1951. xxiv and 466 pp. 36s. net.]

A Simple Explanation of the Legal Aid Scheme. By Derek H. Hene M.A., Barrister-at-Law. With a Foreword by Sir Norman Birkett. (Daily Express Legal Guides No. 1.) [London : Daily Express. 56 pp. 2s. net.]

The Legal Aid and Advice Act was discussed at length in these pages by Professor L. C. B. Gower (13 M.L.R. 81–87) and the temptation must therefore be resisted of making the appearance of these two works an occasion for reopening the subject at length. Mr. Sachs' manuscript appears to have been completed by February 15, 1951, and by that time, or even by now, there has, of course, not yet been sufficient opportunity for forming any definite views on the working of the scheme even in its truncated present form, nor are there more than a few decisions to deal with. Almost half of his book consists in fact of appendices which set out the full text of the Act with some annotations as well as the principal regulations, schemes, tables and forms relating to legal aid in civil and criminal cases.

Yet, since Mr. Sachs himself played an important part in the preliminary work for this most important new legislation, his Introduction (of 212 pp.), concerned as it is with the origin and scope of the Act, is an informative piece of work, well-considered, vigorously written and by no means uncritical. Of the greatest value, for instance, is the fact that the author has devoted a whole special chapter to the position of the unassisted litigant who, as Mr. Sachs rightly points out, is hardly less closely (though rather negatively) affected by the new Act than his opponent. The additional risks and obligations which he faces when he becomes involved in litigation with an assisted person are formidable, for his chances of recovering costs even if successful appear to be slight. In enumerating the steps which can be taken, both before and after the action has been brought to minimise these risks, Mr. Sachs draws attention inter alia to section 46 of the County Courts Act, 1934. His submission that the right to secure remission to the county court of an action for tort is not affected by the new Act has in the meantime been confirmed by the Court of Appeal in *Burton* v. *Holdsworth* [1951] 2 All E.R. 381.

Mr. Sachs' exposition is in the first place designed for the practitioner, while Mr. Hene's little book has been written, in simple language, to help those who want to find out whether they are likely to get legal aid under the Act and how they should put their case when applying for it. The two books under review are therefore, despite difference of size, complementary, because most of Mr. Hene's book is devoted to a careful and systematic statement of the information which the applicant must provide to the local

committee in the most common types of cases; above all divorce and annulment of marriage. There is added a full list of addresses of local committees to whom the application must be addressed.

H. A. H.

Schweizerisches Jahrbuch für Internationales Recht — Annuaire de Droit International—Herausgegeben von der Schweizerischen Vereinigung für Internationales Recht. Vol. 6. 1949. [Zürich: Polygraphischer Verlag. 292 pp. 20 Swiss frs.]

The *Swiss Yearbook for International Law* has long become not only an indispensable reference work for anybody seriously engaged in research in international law: it has also been for long one of the most helpful publications for those who are engaged in the practice of private and public international law. The present volume, which bears the date of 1949, but was in fact printed late in 1950, continues to maintain the high standard of its predecessors. The documentary part in particular contains a great deal of material which is of vital interest to practitioners. Professor Guggenheim's reports on the development of international law, Professor Gutzwiller's notes on Swiss decisions on the conflict of laws as well as Dr. Alexander's summaries of the statements on foreign law by the Federal Department of Justice constitute veritable mines of information. Among the leading articles the present writer was particularly interested in Dr. Bindschedler's sober discussion of the position of Germany in international law. This topic has been widely discussed, but Dr. Bindschedler does not rehash the old arguments: he deals in a most reasonable manner with the problems arising from the Occupation Statute, the formation of the Federal Republic and that of the German Democratic Republic, *i.e.*, his treatment starts where the old controversy has ended. If he has not solved all the puzzles, one cannot be surprised: the situation is unprecedented in history. It belongs to those for which law has not been made, but which themselves make law.

E. J. Cohn.

Lehrbuch des Sachenrechts. By Dr. Harry Westermann, Professor of Law at the University of Münster. [Karlsruhe: Verlag C. F. Müller. 1951. xvi and 676 pp. Price 26 Dm.]

Professor Westermann has written a handbook of the German law relating to movable and immovable property which deserves high praise for the lucidity of its diction and arrangement. As a students' textbook—notwithstanding its size—it should prove a powerful competitor for other similar works, now on the market, which does not include the third volume of the classic book on the topic by Martin Wolff. Comparative lawyers will be particularly attracted by the extensive references to literature and court decisions and by the instructive discussion of deontological problems. The present reviewer would be inclined to think that the author would do well to amplify the historical notes and to insert references to comparative law in future editions of the work. There can fortunately be little doubt that these will be called for. The author would perhaps also have done well to deal a little more extensively with the legislation of the Allied High Commission as far as it relates to his topic. Military Government Law No. 52 (Control of Property) and Law No. 59 (Restitution of Property to Victims of Nazi Oppression) are briefly mentioned, but one should have thought that they would have deserved a considerably more extensive treatment—both on

account of the legislative conceptions which they incorporate and on account of their importance for legal practice in contemporary Germany. The legislation on agrarian reform (which is also largely Allied legislation) is dealt with more fully. The author is sceptical in regard to the question whether it will really result in solving the problem of the settlement of refugees from the East. It seems likely that this scepticism is only too well-founded.

E. J. Cohn.

The Law of Meetings. By Sebag Shaw and Denis Townsend. Second revised edition. [London : Macdonald & Evans. xxix and 284 pp. 15s. net.]

We reviewed the first edition of this book in 11 M.L.R. at p. 366, and commended it. The changes which have been made in the present edition are almost entirely those necessitated by the passing of the Companies Act, 1947, though there have also been made a number of small amendments in the chapter relating to local government meetings. We are glad to note that the publishers have not increased the price of the volume.

C.

Books and Publications received :—

Landlord and Tenant. By R. Borregaard. Third Edition. [Stevens & Sons. 1951. x and 102 pp. 6s. net.]

The Law of Wills. By R. Cross. Second Edition. [Stevens & Sons. 1951. vii and 96 pp. 6s. net.]

Konstam's Income Tax. Eleventh Edition. Release 7, December 15, 1951. [London: Stevens & Sons: Sweet & Maxwell.]

The Lawyer's Companion and Diary for 1952. Part I. By Ernest L. Buck. Part II. By Leslie C. E. Turner. [Stevens & Sons; Shaw & Sons, Ltd. xxiv and 166 and 1519 pp. 18s. net.]

The Indian Digest, 1946 to 1952, of Cases (Civil—Criminal—Revenue) and Statutes. By V. V. Chitaley b.a., ll.b., and S. Appu Rao b.a., b.l. Vols. 1 and 2, Rs. 16 per volume. The Code of Civil Procedure. (V of 1908), Fifth (1951) Edition. Vol. III. Rs. 18 per volume. The Indian Limitation Act (IX of 1908), Third (1952) Edition. Vol. I. Rs. 18 per volume. [Nagpur : The All India Reporter, Ltd.]

Notes on Chancery Practice. By F. G. R. Jordan. Second Edition. [The Solicitors' Law Stationery Society, Ltd. 1952. 98 pp. 7s. 6d. net.]

A French-English English-French Dictionary of Legal Words and Phrases. By A. W. Dalrymple m.a. Second Edition. [Stevens & Sons. 1951. 218 pp. 21s. net. Available separately at 12s. 6d. each.]